No. 75-699

SUPREME COURT, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

LEON GOLDFARB

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional and statutory provisions involved	2
Statement	3
The question is substantial	4
Conclusion	12
Appendix A	1a
Appendix B	7a
Appendix C	8a

CITATIONS

Cases:

Coffin v. *Secretary of Health, Education, and Welfare*, D.C. D.C. Civil Action No. 1890-73, decided July 14, 1975	4
Flemming v. *Nestor*, 363 U.S. 603	5
Frontiero v. *Richardson*, 411 U.S. 677	3, 4, 7, 8, 9, 10
Jablon v. *Secretary of Health, Education, and Welfare*, D. Md., Civil No. K-74-739, decided July 28, 1975	4
Silbowitz v. *Secretary of Health, Education, and Welfare*, S.D. Fla., Nos. 74-924-Civ-CF and 74-925-Civ-CF, decided June 20, 1975	4
Weinberger v. *Salfi*, No. 74-214, decided June 26, 1975	4, 5, 6, 11

Cases—Continued — Page

Weinberger v. *Wiesenfeld*, 420 U.S. 636 — 3, 4, 7, 8, 9

Constitution and statutes:

Constitution of the United States, Fifth Amendment — 2

Social Security Act, 49 Stat. 623, as amended:

Section 202, 42 U.S.C. 402 — 6
Section 202(b), 42 U.S.C. 402(b) — 9
Section 202(b)(1)(E), 42 U.S.C. 402(b)(1)(E) — 6
Section 202(c), 42 U.S.C. 402(c) — 2, 4
Section 202(c)(1)(C), 42 U.S.C. 402(c)(1)(C) — 5
Section 202(c)(1)(D), 42 U.S.C. 402(c)(1)(D) — 5, 6
Section 202(d), 42 U.S.C. 402(d) — 9
Section 202(e)(1)(E), 42 U.S.C. 402(e)(1)(E) — 6
Section 202(f), 42 U.S.C. 402(f) — 2, 3
Section 202(f)(1)(A)-(E), 42 U.S.C. 402(f)(1)(A)-(E) — 3
Section 202(f)(1)(B), 42 U.S.C. (Supp. III) 402(f)(1)(B) — 3
Section 202(f)(1)(D), 42 U.S.C. 402(f)(1)(D) — 3
Section 202(f)(1)(E), 42 U.S.C. (Supp. III) 402(f)(1)(E) — 3, 5, 6
Section 202(h), 42 U.S.C. 402(h) — 9
Section 205(g), 42 U.S.C. 405(g) — 4

28 U.S.C. 2282 — 3

Miscellaneous: — Page

Hearings Before a Subcommittee of the Committee on Ways and Means of the House of Representatives on the Analysis of the Social Security System, 83d Cong., 1st Sess. (1953) — 10
H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939) — 10
Linden, *Women: A Demographic, Social, and Economic Presentation* 34 (1971) — 7
Report of the 1971 Advisory Council on Social Security, H.R. Doc. No. 92-80, 92d Cong., 1st Sess. (1971) — 10
Report of the 1949 Advisory Council on Social Security, S. Doc. No. 203, 80th Cong., 2d Sess. (1945) — 7
S. Rep. No. 1669, 81st Cong., 2d Sess. (1950) — 7

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The memorandum and order of the district court (App. A, *infra*) are reported at 396 F. Supp. 308.

JURISDICTION

The order of the three-judge district court declaring portions of 42 U.S.C. 402 unconstitutional and directing the payment of benefits to the plaintiff was

entered on June 17, 1975. A notice of appeal to this Court (App. B, *infra*) was filed on July 15, 1975. The time for docketing the appeal was extended by order of Mr. Justice Marshall first to October 13, 1975, and then to November 12, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 11, n. 8.

QUESTION PRESENTED

Whether Section 202(f) of the Social Security Act, invidiously discriminates [redacted] by conditioning the payment of widower's insurance benefits upon a showing that the widower was dependent upon his wife for more than half his support, whereas widow's insurance benefits are payable without any such showing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 202(c) and (f) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. 402(c) and (f), is set forth in App. C, *infra*.

STATEMENT

Appellee, after the death of his wife, applied to the Social Security Administration for widower's insurance benefits pursuant to Section 202(f) of the Social Security Act, 42 U.S.C. 402(f). His application was denied because he failed to establish, as required by Section 202(f)(1)(D), that he had been "receiving at least one-half of his support * * * from [his wife] at the time of her death * * * or * * * at the time she became entitled to old-age or disability insurance benefits * * *."[1]

Appellee then instituted this suit in the United States District Court for the Eastern District of New York, requesting that that dependency requirement be declared unconstitutional, on the ground that no similar showing of dependency is required as a condition of eligibility for widow's insurance benefits. A three-judge district court was convened pursuant to 28 U.S.C. 2282. The court granted the requested relief on the basis of this Court's decision in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, and *Frontiero* v. *Richardson*, 411 U.S. 677, and directed the Secretary of Health, Education, and Welfare to begin payment of widower's insurance benefits to appellee.

---

[1] The other conditions on eligibility for widower's insurance benefits are set forth in Section 202(f)(1)(A) to (E). In particular, the widower must have attained age 60 or, if disabled, age 50 and must not be entitled to old-age insurance benefits equal to or in excess of his deceased wife's primary insurance amount. See 42 U.S.C. (Supp. III) 402(f)(1)(B) and (E).

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the distribution of Social Security benefits to individuals of retirement age. The decision below misreads the significance of this Court's decisions in *Wiesenfeld* and *Frontiero* and is inconsistent in approach with *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975.[2] If the decision below, and certain related decisions,[3] are permitted to stand, the

[2] We do not, however, challenge the jurisdiction of the district court on the basis of *Salfi*. Although appellee did not seek administrative reconsideration of the initial denial of his application for widower's benefits, the Secretary has determined that further administrative review would have been futile and therefore that the initial denial was "final" for purposes of Section 205(g) of the Act. See *Salfi, supra*, slip op. 15. The Secretary is currently considering the promulgation of regulations that will specify the circumstances under which a decision denying benefits without a hearing will be treated as "final."

[3] The decision below is one of four recent district court decisions holding a dependency provision of Section 202 unconstitutional. In *Silbowitz* v. *Secretary of Health, Education, and Welfare*, S.D. Fla., Nos. 74-924-Civ-CF and 74-925-Civ-CF, decided June 20, 1975; *Coffin* v. *Secretary of Health, Education, and Welfare*, D.C. D.C., Civil Action No. 1890-73, decided July 14, 1975 and *Jablon* v. *Secretary of Health, Education, and Welfare*, D. Md., Civil No. K-74-739, decided July 28, 1975, the district courts held unconstitutional the analogous dependency provision with regard to husband's insurance benefits under Section 202(c). The Solicitor General has authorized the docketing of appeals in all four cases.

Husband's insurance benefits are payable to men of retirement age whose wives are receiving old-age or disability insurance benefits, upon the showing that the husband was receiving at least one-half of his support from his wife at the time of her retirement or disability, and that he is not entitled

Secretary will be required to pay approximately $400 million in additional benefits annually.[4] This added cost will impose a severe burden on the Social Security trust fund's already strained resources. In these circumstances, plenary consideration by the Court is warranted.

In *Salfi*, this Court reconciled its holdings concerning classifications in social welfare legislation. It held that the pertinent analysis of such legislation under the Due Process Clause is whether "the statute manifests a patently arbitrary classification, utterly lacking in rational justification" (slip op. 16, quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611). In establishing special insurance benefits for widows and widowers, and for certain wives and hus-

to old-age insurance benefits equal to or in excess of one-half his wife's primary insurance amount. Section 202(c)(1)(C) and (D). Since the considerations that bear upon the constitutionality of the dependency conditions for husband's insurance benefits and widower's insurance benefits appear to be identical, we here discuss the substantiality of the question presented in the context of both sets of cases.

[4] This estimate is provided by the Social Security Administration and is based upon actuarial predictions of the additional number of men who will qualify for husband's or widower's insurance benefits under the district courts' decisions. A large proportion of the men who will be so affected are current or retired public employees who are otherwise covered by federal, state, or municipal pension plans, rather than by Social Security. Most other nondependent husbands or widowers would be ineligible for such benefits for the independent reason that their own entitlement to old-age insurance benefits would exceed the maximum amount prescribed by Sections 202(c)(1)(D) and (f)(1)(E). See notes 1 and 3, *supra*.

bands of retired beneficiaries, Congress intended to make benefits available to men and women of retirement age on the basis of their dependency on the earnings of their spouses. Those benefits "are available upon compliance with an objective criterion, one which the legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility." *Salfi*, *supra*, slip op. 20. The statutes at issue here thus fully satisfy the requirements of the Constitution.

Section 202 requires a male of retirement age who applies for benefits on the basis of his wife's earnings account to demonstrate that he is entitled to lesser old-age insurance benefits than his wife,[5] and, in addition, that he had received at least one-half of his support from his wife when she began receiving old-age or disability benefits or when she died. A female of retirement age who applies for benefits on the basis of her husband's earnings account must also demonstrate that her entitlement to old-age insurance benefits is less than her husband's, but she need not show that at the time of eligibility her husband furnished half of her support. Thus the test for husband's and wife's, and for widow's and widower's, insurance benefits are the same except

[5] In the case of husband's and wife's insurance benefits, it must be shown that the applicant's entitlement to old-age insurance benefits is less than one-half the spouse's; in the case of widower's and widow's insurance benefits, it must only be shown that the applicant's entitlement to such benefits is less than the spouse's. See Section 202(b)(1)(E), (c)(1)(D), (e)(1)(E), and (f)(1)(E).

that the dependency of the man must be proven, while the dependency of the woman is presumed.

This legislative classification reasonably implements the objective of Congress to confer Social Security benefits upon spouses who were dependent upon the primary wage earner.[6] As this Court has observed, "[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses * * * is not entirely without empirical support. See *Kahn* v. *Shevin*, 416 U.S. 351, 354 n. 7 (1974)." *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 645. Indeed, despite the changing role of women in the work force, it is still more probable than not that a married woman will not be self-supporting. In 1971, less than half—41.5 percent—of married women worked (see *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 689, n. 23; and *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 643, n. 11), and in less than one out of every eight families in which the wife works does she earn more than half the family income.[7] Thus the presumption of the wife's dependency is not irrational, especially where it has already been shown

[6] The legislative history of the statutes involved here make plain that their purpose was to replace support lost to the spouse upon the retirement or disability of the wage earner. See, *e.g.*, S. Rep. No. 1669, 81st Cong., 2d Sess. 63 (1950); Report of the 1949 Advisory Council on Social Security, S. Doc. No. 203, 80th Cong., 2d Sess. 38 (1945)

[7] In no more than 12 percent of those families where the wife works does the wife contribute more than 50 percent of the total family income. Linden, *Women: A Demographic, Social, and Economic Presentation* 34 (1971).

that her entitlement to old-age insurance benefits, based upon covered employment, is less than her husband's. A similar presumption on behalf of husbands would not be equally rational. Not only are men more likely to be self-supporting, but in those cases where the husband's primary insurance is less than his wife's, there is a substantial likelihood that the explanation is not that the husband was in fact economically dependent upon his wife but rather that his earnings were outside the coverage of the Social Security Act. See note 4, *supra*. For this reason it is appropriate to require the husband to prove dependency as a condition of receiving dependency benefits.

In holding the challenged statutes unconstitutional, the courts below regarded this Court's decisions in *Wiesenfeld* and *Frontiero* as dispositive. Those decisions, however, are not controlling here. In *Wiesenfeld*, the Court held without rational basis a legislative classification that authorized the payment of benefits, on the basis of a deceased wage-earner's account, to surviving mothers with children in their care, while denying such benefits to similarly situated fathers. The Court noted that the purpose of the mother's benefits was to aid children as dependents by providing "children deprived of one parent with the opportunity for the personal attention of the other * * *." 420 U.S. at 648-649. Congress' provision of benefits only for mothers, and not for fathers, was unrelated to that legislative objective. 420 U.S. at 648-652.

The provisions at issue here, however, have no similar overriding social objective beyond the satisfaction of the economic needs of the individual dependent beneficiary. The benefits they provide are intended to replace the economic support lost by a defendent spouse upon the death, retirement or disability of the wage earner.[8] Moreover, a fatal flaw in the provision at issue in *Wiesenfeld* was that it denied the male applicant any "opportunity to show, as may well have been the case, that he was dependent upon his wife for his support * * *." 420 U.S. at 645. In contrast, the statutory scheme in question here provides that opportunity.

Nor does this Court's decision in *Frontiero* require invalidation of the statutory scheme here. In *Frontiero*, this Court held unconstitutional certain statutes (37 U.S.C. 401, 403; 10 U.S.C. 1072, 1076) that automatically provided a married serviceman with dependent's benefits for his wife, but provided such benefits to a married servicewoman only if she established that she provided more than one-half her husband's support. Under those statutory provisions, female officers had to prove their spouse's dependency merely in order to receive compensation equal to that

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[8] Actual or presumed dependency is a central feature of all dependents' benefits under the Act where the purpose is to compensate for the loss of the wage-earner's support. Thus, in addition to the benefits afforded husbands, wives, widows, and widowers of retirement age, dependency is also an underlying requirement for parents' benefits (42 U.S.C. 402(h)), children's benefits (42 U.S.C. 402(d)), and divorced wife's benefits (42 U.S.C. 402(b)).

granted male officers. The Court concluded that that distinction did not comport with the underlying congressional purpose of providing, through fringe benefits, compensation for service as an officer roughly comparable to compensation for equivalent civilian employment, for it resulted in servicewomen receiving less compensation for equivalent work in an identical family situation. In that context the distinction between actual and presumed dependency was held to be discriminatory and unrelated to the objective of the military compensation scheme.

In contrast to the situation in *Frontiero*, dependency, not compensation, is the key to the meaning of the legislative program in question here. These special benefits for men and women of retirement age are intended to supplement their primary insurance benefits, if any, when the death or retirement of the principal wage earner results in a loss of, or reduction in, necessary support. The benefits are intended for aged dependents who have suffered a loss of "support, or a potential loss of support, when the worker's earnings are cut off." Report of the 1971 Advisory Council on Social Security, H.R. Doc. No. 92-80, 92d Cong., 1st Sess. 22 (1971).[9]

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[9] See also testimony of Robert M. Ball, Acting Director of the Bureau of Old-Age and Survivors Insurance, Hearings Before a Subcommittee of the Committee on Ways and Means of the House of Representatives on the Analysis of the Social Security System, 83d Cong., 1st Sess. 569 (1953); H.R. Rep. No. 728, 76th Cong., 1st Sess. 7, 11 (1939) (concerning original legislation providing benefits to members of wage-earner's family).

In legislating these dependency benefits, Congress did not exceed its powers by extending to women, but not to men, the presumption of dependency.[10] The distinction Congress has drawn is grounded in empirical evidence and reflects the social realities that pertained during the working lives of these retired men and women, and it amply satisfies the rational basis test that, under this Court's decision in *Salfi*, governs due-process challenges to legislative classifications of this kind.

---

[10] We recognize that the presumption afforded to women may result in the payment of benefits to some women whose earnings were not covered by the Social Security Act and who were in fact self-supporting. But such over-inclusiveness does not render constitutionally impermissible the imposition upon men of a burden of proving dependency. Congress could reasonably assume that the administrative costs that would be entailed by requiring dependency determinations for all wives and widows of retirement age might exceed the amount of benefits paid as a result of any over-inclusiveness resulting from a presumption of dependency. In contrast, no such assumption could reasonably have been made respecting the costs of extending the presumption to men. See *Salfi, supra*, slip op. 24-25, 28, 29-33.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
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WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys.

NOVEMBER 1975.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1188

LEON GOLDFARB, PLAINTIFF

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

MEMORANDUM AND ORDER

APPEARANCES:

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Of Counsel

Leonard P. Moore, C.J.; Jack B. Weinstein, D.J.; and Orrin G. Judd, D.J.

Per Curiam:

Seventy year old Leon Goldfarb applied for social security survivor's benefits after the death of his wife. She had been paying social security taxes for some twenty-five years. His employment had not been covered by social security. Mr. Goldfarb's claim was denied for the reason that,

> "You do not qualify for a widower's benefit because you do not meet one of the requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she did."

It is conceded that had the gender of these spouses been reversed, the plaintiff would have been granted social security benefits. A female need not show "at least one half support from" the deceased spouse. *See* 42 U.S.C. § 402(b), (c)(1)(C), (e), (f)(1)(D). Thus, the statute and its application to this plaintiff, "deprive women of protection for their families which men receive as a result of their employment." Weinberger v. Wiesenfeld, —— U.S. ——, ——, 95 S. Ct. 1225, 1232, 43 L. Ed. 2d 514 (1975). *See also* Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

This case is controlled by *Wiesenfeld*:

> "[S]he not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation

> premised upon assumptions as to dependency . . ., the Constitution also forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men."

—— U.S. at ——, 95 S. Ct. at 1232, 43 L. Ed. 2d at 523.

Whatever may have been the ratio of contribution to family expenses of the Goldfarbs while they both worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple or one of them retired and to her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men. The government has failed to justify this gender-based discrimination.

Plaintiff's request for a declaratory judgment that 42 U.S.C. § 402(b), (c)(1)(C), (e), (f)(1)(D), is unconstitutional insofar as it discriminates against widowers on the basis of sex must be granted. The application for certification as a class is denied. *See* Wiesenfeld v. Secretary of Health, Education and Welfare, 367 F. Supp. 981, 986-987 (D.N.J. 1973), *aff'd sub nom.* Weinberger v. Wiesenfeld, —— U.S. ——, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975). The matter is remanded to the Secretary of Health, Education and Welfare who is directed to make payments

for the period during which Mr. Goldfarb would have been qualified to receive benefits but for the discrimination against widowers now held to be unconstitutional.

So ordered.

Dated: Brooklyn, New York
June 17, 1975

/s/ Leonard P. Moore
LEONARD P. MOORE, C.J.
Concurring in separate opinion.

/s/ Jack B. Weinstein
JACK B. WEINSTEIN, D.J.

/s/ Orrin G. Judd
ORRIN G. JUDD, D.J.

MOORE, Circuit Judge (concurring)

In light of the Supreme Court's decisions in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) and *Weinberger* v. *Wiesenfeld*, —— U.S. —— (1975) I feel bound to reluctantly concur but not without deploring the necessity of judicial exercise of the legislative functions of government. The Congress presumably, after giving the problem due consideration and weighing the pertinent facts, enacted the legislation in question. If there are to be presumptions it would be but fair to the legislative branch to presume that their enactments were designed to be rationally related to the goal which they desired to achieve. By this decision it seems to me that the court is creating a new class of beneficiaries which Congress did not create.

Reference is made by defendant to an estimate that if all persons eligible for the benefits sought by plaintiff received the payments requested, the cost would be a third of a billion dollars. In a day in which the public press speaks of national deficits of sixty to one hundred billion dollars, a mere one-third of a billion may seem *de minimis*. However, in addition to the classification powers thus assumed by the courts, any such result would, in effect, extend the court's powers to the public purse. In short and to paraphrase a Biblical saying; I would render unto Congress the things that are Congress* and thus

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*St. Mark, 12.17

avoid a judicial invasion of the Congressional field, leaving to Congress the privilege to enact such legislation as may be just, proper and constitutionally well based under the circumstances.

/s/ Leonard P. Moore
LEONARD P. MOORE, U.S.C.J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 74 C 1188

LEON GOLDFARB, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252, 1253 and 2101, from the judgment entered in this action by the three-judge District Court on June 17, 1975.

Dated at Brooklyn, N.Y., this 15th day of July, 1975. 1975.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201
Attorney for the defendant
Secretary of Health, Education and Welfare

By: /s/ Paul B. Bergman
PAUL B. BERGMAN
Assistant U.S. Attorney
Chief, Appeals Division

APPENDIX C

Pertinent provisions of Title II of the Social Security Act are as follows:

Section 202(c), 42 U.S.C. 402(c):

> (c)(1) The husband (as defined in Section 216 (f)) of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62,
>
> (C) was receiving at least one-half of his support * * * from such individual [at the time she became entitled to old age benefits]
>
> * * * * *
>
> and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, * * *
>
> (D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit * * *.

Section 202(f), 42 U.S.C. 402(f):

> (f)(1) The widower * * * of an individual who died a fully insured individual, if such widower—
>
> (A) has not remarried,
>
> (B)(i) has attained age 62 * * *
>
> (C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died, * * *
>
> (D)(i) was receiving at least one-half of his support * * * from such individual at the time of her death * * *
>
> (E) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than [82½ percent of] the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit * * *.

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APPENDIX

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

—*v.*—

LEON GOLDFARB

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

DOCKETED NOVEMBER 12, 1975
PROBABLE JURISDICTION NOTED FEBRUARY 23, 1976

In The

Supreme Court of the United States

October Term, 1975

No. 75-699

F. David Mathews, Secretary of Health, Education, and Welfare,

Appellant,

—*v.*—

Leon Goldfarb

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

INDEX TO APPENDIX

	Page
In the United States District Court for the Eastern District of New York:	
Docket Entries	1
Complaint filed August 15, 1974	5
Amended Complaint with Exhibits A and B (letter of April 4, 1974 from Bureau of Retirement and Survivors Insurance, Social Security Administration, advising Mr. Goldfarb that he failed to meet the support requirements necessary for widower's benefits) filed October 16, 1974	11
Answer	21
Order of the Supreme Court Noting Probable Jurisdiction, February 23, 1976	24

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
8-15-74	Complaint filed.
8-19-74	Summons issued.
8-19-74	Memorandum of law in suport of application for three-judge court filed.
8-23-74	Summons returned and filed/executed.
10-16-74	Amended Complaint filed.
10-16-74	Notice of Motion For Determination of Class Action with Memorandum of Law annexed on 11-1-74 filed.
10-30-74	ANSWER of deft filed.
11-1-74	Before TRAVIA, J.—Case called—Case reassigned to J. Weinstein.
11-4-74	Letter from Nadine Taub dtd 10-31-74 filed.
11-4-74	By WEINSTEIN, J.—Order dtd 11-4-74 setting 11-22-74 at 9:30 AM for hearing on three-judge court determination filed on document #7.
11-19-74	Letter dated Nov. 14, 1974 filed from N Taub to J Weinstein.
11-21-74	Deft's Memorandum of Law in Opposition to pltff's motion for determination that action be maintained as class action filed.
11-22-74	Before WEINSTEIN, J.—Case called. Upon lack of opposition the motion for a three judge court is granted. Submit order. Application for class action is denied, with leave to renew before the three judge court. Submit order.
12-2-74	By WEINSTEIN, J.—Order dated 11/26/74 filed that the application for a 3 Judge Court should be granted.

DATE	FILINGS—PROCEEDINGS

2-4-75 Copy of letter dtd 2-4-75 to Ch J. Kaufman from Dist. J. Weinstein filed.

2-4-75 Carbon copy of letter dtd 11-27-74 to Ch. J. Kaufman from Dist. J. Weinstein filed.

2-5-75 Carbon copy of letter dtd 2-4-75 to Ch. J. Kaufman from J. Weinstein filed.

2-26-75 Letter dated 2/24/75 filed from N. Taub to J. Weinstein.

2-28-75 Copy of letter dated 2/27/75 filed from J. Weinstein to J. Kaufman.

4-25-75 Notice of Motion, ret. when Judge sets date filed re: for class action.

4-25-75 Pltff's Memorandum in Support of Request for confirmation of class action status filed.

4-25-75 Notice of Motion, ret. when Judge sets date filed re: for summary judgment in favor of the pltffs.

4-25-75 Pltff's Memorandum of Law in Support of Motion for Summary Judgment filed.

5-10-75 Letter dtd 5-7-75 to J. Weinstein from Pamela McGuire filed.

5-10-75 By WEINSTEIN, J.—Order dtd 5-9-75 re 6-16-75 as return date for pltff's motion re class action etc. See document #19.

5-28-75 Designation of Judges dtd 5-23-75 (by CH. J. KAUFMAN, USCA) designating Judges Leonard P. Moore and Judge Orrin C. Judd in addition to J. Weinstein pursuant to 28 USC 2282 etc filed.

5-28-75 By WEINSTEIN, J.—Order dtd 5-27-75 directing Clerk to send a copy of the entire file to Judges Moore and Judd. See bottom of document #20.

DATE	FILINGS—PROCEEDINGS

5-28-75 By WEINSTEIN, J—Order dtd 5-27-75 re argument on motions pending will be heard on 6-16-75, and directing Clerk to send copies of this order to designated Judges and counsel filed.

6-5-75 Letter dtd 6-4-75 to J. Weinstein from Pamela C. McGuire filed.

6-9-75 Notice of motion & memorandum of law to dismiss complaint, ret 6-16-75 at 9:30 A.M. filed. (copies mailed to Moore & Judd).

6-12-75 Pltff's reply memorandum filed.

6-16-75 Before WEINSTEIN, JUDD, MOORE J.—Case called—Pltff's motion for summary judgment argued—Decision reserved.

6-19-75 By WEINSTEIN, J.—JUDD, J.—MOORE, C.J.—Memorandum and Order filed that pltff's request for declaratory judgment is granted—Application for certification as a class denied, etc.

7-15-75 Notice of appeal filed. Duplicate of appeal mailed to attys for pltff. Duplicate of appeal & duplicate of docket entries mailed to U.S. Supreme Court.

8-28-75 Copy of letter dtd 8-26-75 to ASUA Stewart from Nadine Taub filed.

10-17-75 Letter from Nadine Taub dtd 10-10-75 re present status filed.

10-31-75 Copy of letter dated 10-27-75 filed from N. Taub to Mr. McMorrow.

1-16-76 Copy of letter from pltff's atty dtd 1-14-76 filed.

2-2-76 Motion of deft ret 2-12-76 for an order granting deft stay of order file 6-19-75 filed.

2-9-76 Affadavit in opposition to defts. application for a stay filed.

DATE	FILINGS—PROCEEDINGS
2-11-76	Notice of Motion, ret. 2/19/76 at 10:30 A.M. filed re: to stay judgment of this court, etc.
2-23-76	By WEINSTEIN, J.—Order denying motion for a stay filed on doc. #32.
3-1-76	Certified copy of order from Supreme Court noting probable jurisdiction filed.
3-18-75	By MOORE, J., JUDD, J., WEINSTEIN, J.—Order dtd. 3-5-76 denying govt's motion for a stay etc., filed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74C 1188

Class Action

THREE-JUDGE COURT REQUESTED

LEON GOLDFARB, individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS

COMPLAINT

I. PRELIMINARY STATEMENT

Plaintiff, individually and on behalf of all persons similarly situated, seeks to have this court declare unconstitutional on its face and as applied two provisions of the Social Security Act. These are 42 U.S.C. § 402(c)(1)(C), a provision of the Social Security Act restricting "Husband's insurance benefits" to men who were receiving at least one-half of their support from their wives at the time their wives' entitlement to old-age or disability benefits accrued, and 42 U.S.C. § 402(f)(1)(D), a provision of the Act restricting "Widower's insurance benefits" to widowers who were receiving at least half of their support from their wives at the time of their wives' retirement, death or period of disability which did not end prior to the month in which the wife's death occurred. The provisions are challenged on the ground that the extra requirement applicable to husbands but not to wives under 42 U.S.C. § 402(b)

and applicable to widowers but not to widows under 42 U.S.C. § 402(e) denies men and women the equal protection of the laws safeguarded by the due process clause of the Fifth Amendment to the United States Constitution. Exclusion of certain males from these Social Security benefits entails a dual discrimination. The Social Security contributions of the female wage earner are worth less than the contributions of a similarly situated male wage earner in terms of the protection afforded the family, and the husband and widower are denied assistance granted to an identically situated wife or widow.

Plaintiff, who qualified for benefits under 42 U.S.C. § 402(b) in all respects except that he was a husband, not a wife, and who qualified for benefits under 42 U.S.C. § 402(c) in all respects except that he is a widower, not a widow, and who qualifies for benefits under 42 U.S.C. § 402(f) in all respects except that he was not receiving at least one-half his support from his wife, seeks an injunction against the continued application of 42 U.S.C. § 402(c)(1)(C) and (f)(1)(D) to deny him husband's and widower's insurance benefits and damages for benefits due to him.

II. JURISDICTION

1. This action for a declaration of rights, injunctive relief and damages arises under the Fifth Amendment to the Constitution of the United States. Jurisdiction is conferred upon this court by 28 U.S.C. § 1331. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000. Adjudication by a three-judge court is sought pursuant to 28 U.S.C. §§ 2282 and 2284. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

III. PARTIES

A. Plaintiff

2. Leon Goldfarb, the named plaintiff, is a citizen of the United States and of the State of New York and

resides at 76-21 250th Street, Bellerose, Long Island, New York 11426.

B. Class Action

3. Plaintiff brings this action on his own behalf and pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated. The members of the class similarly situated are all husbands and widowers entitled to Social Security benefits under 42 U.S.C. § 402(c) and (f) respectively except for the fact that they were not receiving at least half of their support from their wives, and who are denied benefits for that reason. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class affecting the right of all members to due process and equal protection of the laws as guaranteed by the Fifth Amendment to the United States Constitution; the claims of the named plaintiff are typical of the claims of the class; the named plaintiff will fairly and adequately protect the interests of the class; and the party opposing the class acts or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

C. Defendant

4. Defendant Secretary of the United States Department of Health, Education and Welfare is responsible for implementation, administration and enforcement of the Social Security Act. Defendant is sued in his official capacity, and as representative of all other administrators, officers and agents charged with implementing, administering and enforcing the Social Security Act in a manner that denies to husbands and widowers the benefits accorded to similarly situated wives and widows.

IV. STATEMENT OF THE CLAIM

5. Plaintiff Leon Goldfarb was born on December 9, 1904. Plaintiff's deceased wife, Hannah Goldfarb, was

born on March 21, 1908. They were married on July 16, 1931. Hannah Goldfarb died on August 22, 1968. Plaintiff has not since remarried.

6. Hannah Goldfarb was employed as a secretary for the New York City Public School System for approximately twenty-five years and was a fully insured individual under the Social Security Act at the time her disability status became effective. She applied for disability benefits as of April 12, 1968 and received disability payments from April through December 1968 (a copy of the letter showing the award of such benefits is appended hereto as Exhibit A).

7. Plaintiff held various positions with the federal government for approximately thirty-seven years, and his last position prior to his retirement in July 1971 at the age of sixty-seven was as managing analyst for the United States Army Signal Corps. While employed by the federal government, plaintiff was not covered by the Social Security Act, and he did not accumulate enough quarters in covered employment to be insured under the Act. Consequently, he has never received old-age or disability insurance benefits under the Social Security Act.

8. In September 1968, plaintiff visited the Social Security Administration District Office located at 165-15 88th Avenue, Jamaica, New York 11432 to file his wife's death certificate and to inquire as to his eligibility for benefits based on his wife's earnings. At that time he was advised that he was ineligible because his wife had not provided one-half of his support.

9. Plaintiff subsequently returned to the Jamaica Office each time the Social Security Act was amended to inquire if he qualified for benefits as a result of the new amendment. In all, plaintiff made approximately six separate inquiries at the office.

10. On his last visit to the Jamaica Office on or about January 17, 1974, plaintiff spoke to a Mr. Lewondowski, drawing his attention to the recent New Jersey District Court decision in *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D.C.N.J. 1973). He indicated that plaintiff might be eligible for widow-

er's insurance benefits and gave plaintiff Widow's Pension Application for Widower's Insurance Benefits to complete. On or about January 18, 1974, plaintiff submitted the birth and death certificates necessary to complete his application.

11. Plaintiff subsequently received a letter (appended hereto as Exhibit B) stating that he did not qualify for widower's benefits because he was not receiving at least one-half of his support from his wife at the time of her death.

12. Plaintiff never applied for husband's insurance benefits because such application would have been futile in that he was ineligible under the terms of 42 U.S.C. § 402(c) and 42 U.S.C. § 402(b).

13. Plaintiff was denied husband's insurance benefits and was and continues to be denied widower's insurance benefits solely on the ground of his sex.

14. The additional requirement of 42 U.S.C. § 402(c)(1)(C) and (f)(1)(D) that husbands and widowers prove that they were receiving at least one-half of their support from their wives denies to plaintiff and all other men similarly situated due process and equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution.

15. Plaintiff and the members of the class he represents are suffering present irreparable injury which will continue in the future by reason of the discriminatory requirement herein complained of; he and the members of the class he represents are and will remain in constant subjection to a constitutionally prohibited denial of due process and equal protection of the laws so long as the additional requirements contained in 42 U.S.C. § 402(c)(1)(C) and 42 U.S.C. § 402(f)(1)(D) are applied to husbands and widowers solely on the ground of their sex. Further pursuit of relief would be futile in view of the discrimination inherent in the statute on its face and in the explicit application of 42 U.S.C. § 402(c)(1)(C) and 42 U.S.C. § 402(f)(1)(D) to males. Plaintiff is without adequate remedy at law to redress the unlawful discrimination herein complained of other than this action for a declaration of rights, an injunction and damages.

V. PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all other persons similarly situated, that this court:

(1) convene a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284 to determine this controversy;

(2) certify that this action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

(3) declare that 42 U.S.C. § 402(c)(1)(C) and 42 U.S.C. § 402(f)(1)(D) are unconstitutional;

(4) issue a preliminary and final injunction restraining defendant and his agents from denying benefits to plaintiff and his class on the ground of failure to satisfy 42 U.S.C. § 402(c)(1)(C) and (f)(1)(D) and requiring application of 42 U.S.C. § 402(b), (c), (e) and (f) in a non-discriminatory manner to both sexes;

(5) order payment to plaintiff Leon Goldfarb of the benefits due to him commencing April 1968 and for each month thereafter;

(6) assess reasonable costs and attorneys fees; and

(7) grant such other and future relief as this court deems just and proper.

Respectfully submitted,

/s/ Nadine Taub
NADINE TAUB
175 University Avenue
Newark, New Jersey 07102
(201) 648-5637

KATHLEEN PERATIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74C-1188

Class Action

THREE-JUDGE COURT REQUESTED

[Filed October 16, 1974]

[Title Omitted in Printing]

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

Plaintiff, individually and on behalf of all persons similarly situated, seeks to have this court declare unconstitutional on its face and as applied two provisions of the Social Security Act. These are 42 U.S.C. § 402(c)(1)(C), a provision of the Social Security Act restricting "Husband's insurance benefits" to men who were receiving at least one-half of their support from their wives at the time their wives' entitlement to old-age or disability benefits accrued, and 42 U.S.C. § 402(f)(1)(D), a provision of the Act restricting "Widower's insurance benefits" to widowers who were receiving at least half of their support from their wives at the time of their wives' retirement, death or period of disability which did not end prior to the month in which the wife's death occurred. The provisions are challenged on the ground that the extra requirement applicable to husbands but not to wives under 42 U.S.C. § 402(b) and applicable to widowers but not to widows under 42 U.S.C. § 402(e) denies men and women the equal protection of the laws safeguarded by the due process clause of the Fifth Amendment to the United States Constitution. Exclusion of certain males from these Social Security benefits entails a dual discrimination. The Social Security contributions of the female wage earner are worth less than the contributions of a similarly situated male wage earner in terms of the protection afforded the family, and

the husband and widower are denied assistance granted to an identically situated wife or widow.

Plaintiff, who qualified for benefits under 42 U.S.C. § 402(b) in all respects except that he was a husband, not a wife, and who qualified for benefits under 42 U.S.C. § 402(c) in all respects except that he is a widower, not a widow, and who qualifies for benefits under 42 U.S.C. § 402(f) in all respects except that he was not receiving at least one-half his support from his wife, seeks an injunction against the continued application of 42 U.S.C. § 402(c)(1)(C) and (f)(1)(D) to deny him husband's and widower's insurance benefits and damages for benefits due to him.

II. JURISDICTION

1. This action for a declaration of rights, injunctive relief and damages arises under the Fifth Amendment to the Constitution of the United States. Jurisdiction is conferred upon this court by 28 U.S.C. § 1331. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000. Adjudication by a three-judge court is sought pursuant to 28 U.S.C. §§ 2282 and 2284. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

III. CLASS ACTION ALLEGATIONS

2. Plaintiff brings this action on his own behalf and pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated. The members of the class similarly situated are all husbands and widowers entitled to Social Security benefits under 42 U.S.C. § 402 (c) and (f) respectively except for the fact that they were not receiving at least one-half of their support from their wives, and who are denied benefits for that reason.

3. The requirements of Rule 23 (a) are met in that:

(a) The class is so numerous that joinder of all members is impracticable. On information and belief the class consists of approximately 250,000 husbands and 150,000 widowers.

(b) There is a common question of law, i.e. whether the discrimination inherent in the challenged statutory scheme, which provides benefits to wives and widows regardless of their dependency, but to husbands and widowers only if they assert and prove their dependency, constitutes invidious discrimination in violation of the due process clause of the Fifth Amendment of the United States Constitution.

(c) The claims of the named plaintiff are typical of the claims of the class. The named plaintiff's interest in the litigation differs from that of the other class members only in the amount of the payments involved.

(d) The named plaintiff will fairly and adequately protect the interests of the class. The named plaintiff intends to vigorously pursue the objective of eliminating the discrimination embodied in 42 U.S.C. § 402 (c) and (f) for the benefit of the class. Plaintiff's interest in coextensive with the interest of the other members of the class and is in no particular adverse to the interest of the class as a whole. Further, the named plaintiff is represented by experienced counsel who will adequately advance his interests as well as those of the class.

4. The requirements of Rule 23 (c)(2) are met in that the party opposing the class acts or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

IV. PARTIES

A. Plaintiff

5. Leon Goldfarb, the named plaintiff, is a citizen of the United States and of the State of New York and resides at 76-21 250th Street, Bellerose, Long Island, New York 11426.

B. Defendant

6. Defendant Secretary of the United States Department of Health, Education and Welfare is responsible for implementation administration and enforcement of the Social Security Act. Defendant is sued in his official capacity, and as representative of all other administrators, officers and agents charged with implementing, administering and enforcing the Social Security Act in a manner that denies to husbands and widowers the benefits accorded to similarly situated wives and widows.

V. STATEMENT OF THE CLAIM

7. Plaintiff Leon Goldfarb was born on December 9, 1904. Plaintiff's deceased wife, Hannah Goldfarb, was born on March 21, 1908. They were married on July 16, 1931. Hannah Goldfarb died on August 22, 1968. Plaintiff has not since remarried.

8. Hannah Goldfarb was employed as a secretary for the New York City Public School System for approximately twenty-five years and was a fully insured individual under the Social Security Act at the time her disability status became effective. She applied for disability benefits as of April 12, 1968 and received disability payments from April through December 1968 (a copy of the letter showing the award of such benefits is appeneded thereto as Exhibit A).

9. Plaintiff held various positions with the federal government for approximately thirty-seven years, and his last position prior to his retirement in July 1971 at the age of sixty-seven was as managing analyst for the United States Army Signal Corps. While employed by the federal government, plaintiff was not covered by the Social Security Act, and he did not accumulate enough quarters in covered employment to be insured under the Act. Consequently, he has never received old-age or disability insurance benefits under the Social Security Act.

10. In September 1968, plaintiff visited the Social Security Administration District Office located at 165-15 88th Avenue, Jamaica, New York 11432 to file his wife's death certificate and to inquire as to his eligibility for benefits based on his wife's earnings. At that time he

was advised that he was ineligible because his wife had not provided one-half of his support.

11. Plaintiff subsequently returned to the Jamaica Office each time the Social Security Act was amended to inquire if he qualified for benefits as a result of the new amendment. In all, plaintiff made approximately six separate inquiries at the office.

12. On his last visit to the Jamaica Office on or about January 17, 1974, plaintiff spoke to a Mr. Lewondowski, drawing his attention to the recent New Jersey District Court decision in *Weisenfeld* v. *Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D.C.N.J. 1973). He indicated that plaintiff might be eligible for widower's insurance benefits and gave plaintiff Widow's Pension Application for Widower's Insurance Benefits to complete. On or about January 18, 1974, plaintiff submitted the birth and death certificates necessary to complete his application.

13. Plaintiff subsequently received a letter (appended hereto as Exhibit B) stating that he did not qualify for widower's benefits because he was not receiving at least one-half of his support from his wife at the time of her death.

14. Plaintiff never applied for husband's insurance benefits because such application would have been futile in that he was ineligible under the terms of 42 U.S.C. § 402(c) and 42 U.S.C. § 402(b).

15. Plaintiff was denied husband's insurance benefits and was and continues to be denied widower's insurance benefits solely on the ground of his sex.

16. The additional requirement of 42 U.S.C. § 402(c)(1)(C) and (f)(1)(D) that husbands and widowers prove that they were receiving at least one-half of their support from their wives denies to plaintiff and all other men similarly situated due process and equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution.

17. Plaintiff and the members of the class he represents are suffering present irreparable injury which will continue in the future by reason of the discriminatory requirement herein complained of; he and the members

of the class he represents are and will remain in constant subjection to a constitutionally prohibited denial of due process and equal protection of the laws so long as the additional requirements contained in 42 U.S.C. § 402 (c) (1) (C) and 42 U.S.C. § 402 (f) (1) (D) are applied to husbands and widowers solely on the ground of their sex. Further pursuit of relief would be futile in view of the discrimination inherent in the statute on its face and in the explicit application of 42 U.S.C. § 402 (c) (1) (C) and 42 U.S.C. § 402 (f) (1) (D) to males. Plaintiff is without adequate remedy at law to redress the unlawful discrimination herein complained of other than this action for a declaration of rights, an injunction and damages.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all other persons similarly situated, that this court:

(1) convene a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284 to determine this controversy;

(2) certify that this action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

(3) declare that 42 U.S.C. § 402 (c) (1) (C) and 42 U.S.C. § 402 (f) (1) (D) are unconstitutional;

(4) issue a preliminary and final injunction restraining defendant and his agents from denying benefits to plaintiff and his class on the ground of failure to satisfy 42 U.S.C. § 402 (c) (1) (C) and (f) (1) (D) and requiring application of 42 U.S.C. § 402 (b), (c), (e) and (f) in a non-discriminatory manner to both sexes;

(5) order payment to plaintiff Leon Goldfarb of the benefits due to him commencing April 1968 and for each month thereafter;

(6) assess reasonable costs and attorneys fees; and

(7) grant such other and future relief as this court deems just and proper.

Respectfully submitted,

/s/ Nadine Taub
NADINE TAUB
175 University Avenue
Newark, New Jersey 07102
(201) 648-5637

KATHLEEN PERATIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016
(212) 725-1222

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Bureau of Retirement and Survivors Insurance

NEW YORK, NEW YORK

When writing about your claim always give Claim No.

Leon Goldfarb
76-21 250 St.
Jamaica, NY 11426

085-18-9866 HS
Hannah Goldfarb

January 17, 1969

A check in the amount of $604.80 for April through December 1968 will be mailed to you by the Treasury Department in a few days. Our records show that payment is due for the reason(s) marked by "X" below:

[X] Payment of amount previously due Hannah Goldfarb, Dec'd.

[ ] Amount due because of increase in rate which became effective

[ ] Check(s) returned by former payee is (are) now payable to you.

[ ] This payment is in addition to your regular monthly benefit check.

[ ] To refund temporary deductions.

[ ] To refund excess premium amounts.

This represents disability benefits due the deceased for the above period.

If you have any questions about your claim, you should get in touch with the most convenient social security office. If you call in person, please take this notice with you.

Sincerely yours,

/s/ Martin Aaron
MARTIN AARON
Director of Operations
Retirement and Survivors Insurance

EXHIBIT B

SOCIAL SECURITY NOTICE OF
DISAPPROVED CLAIM

From: Bureau of Retirement and Survivors Insurance
Northeastern Program Center,
Flushing, New York 11368

Date: April 4, 1974

Leon Goldfarb
76 21 250 St
Jamaica, NY 11426

Your Claim Number:
085-18-9866

This notice refers to your claim for benefits under the Social Security Act, on the earnings record of Hannah Goldfarb.

You do not qualify for a widower's benefit because you do not meet one of the requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she died.

If you believe that this determination is not correct, you may request that the case be re-examined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If you have additional evidence, submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

If you have questions about your claim, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

Enclosure:
DHEW (SSA) 73-10058

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed October 30, 1974]

[Title Omitted in Printing]

Civil Action No. 74 C 1188

ANSWER

FIRST DEFENSE

1. This court lacks subject matter jurisdiction over plaintiff's claim for money.

SECOND DEFENSE

2. The amended complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

3. Defendant admits the allegations contained in paragraph 13 of the amended complaint; denies the allegations contained in paragraphs 2, 3, 4, 15, 16, and 17; and is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 10 and 11.

4. Defendant denies the allegations contained in "I Preliminary Statement" of the amended complaint concerning discrimination in the administration of the Social Security benefits program; is without knowledge or information, other than as afforded by the amended complaint, sufficient to form a belief as to the truth of the allegations concerning the relief sought by plaintiff or the bases relied upon by plaintiff for such relief; and, as to the allegations concerning certain provisions of the Social Security Act, refers to the official text of the Act.

5. Defendant denies the allegation contained in paragraph 1 of the amended complaint that this court has jurisdiction of the subject matter of the action insofar as the action seeks an award of money and is without knowledge or information, other than as afforded by the amended complaint, sufficient to form a belief as to the truth of the allegations concerning the relief sought by plaintiff or the bases relied upon by plaintiff for such relief.

6. Defendant admits the allegations contained in paragraph 5 of the amended complaint except that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation concerning plaintiff's citizenship.

7. Defendant denies the allegations contained in paragraph 6 of the amended complaint except admits that the Secretary of the United States Department of Health, Education and Welfare is responsible for the implementation, administration and enforcement of the Social Security Act and that defendant is sued in his official capacity.

8. Defendant admits the allegations contained in paragraph 7 of the amended complaint except denies that Hannah Goldfarb was born on March 21, 1908 and is without knowledge or information sufficient to form a belief as to the truth of the allegation concerning plaintiff's date of marriage.

9. Defendant admits the allegations contained in paragraph 8 of the amended complaint except that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Hannah Goldfarb's application for and receipt of disability benefits.

10. Defendant admits the allegations contained in paragraph 9 of the amended complaint except that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning length of time plaintiff was employed by the federal government, positions held by plaintiff, and plaintiff's age at the time of his retirement.

11. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the amended complaint except that defendant admits that plaintiff spoke to a Mr. Lewondowski on January 17, 1974 and that plaintiff submitted a completed application for widower's insurance benefits on that date.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the amended complaint except that defendant admits that plaintiff was ineligible for husband's insurance benefits under the terms of 42 U.S.C. § 402(c)(1)(C).

WHEREFORE, defendant demands judgment dismissing the complaint, with costs.

Dated: Brooklyn, New York October 29, 1974

DAVID G. TRAGER
United States Attorney
Attorney for Defendant

By: /s/ Henry A. Brachtl
HENRY A. BRACHTL
Assistant U.S. Attorney
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201
Telephone (212) 596-3563

TO:

Nadine Taub, Esq.
c/o Women's Rights Litigation Clinic
175 University Avenue
Newark, New Jersey 07102

Kathleen Peratis
American Civil Liberties Union
22 East 40th Street
New York, New York 10017

SUPREME COURT OF THE UNITED STATES

No. 75-699

F. DAVID MATHEWS, Secretary of Health, Education and Welfare, APPELLANT

v.

LEON GOLDFARB

APPEAL from the United States District Court for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 23, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 207198 253

Supreme Court, U. S.
FILED
DEC 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS,
Secretary of Health, Education, and Welfare,
Appellant,

—v.—

LEON GOLDFARB,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN WILLERT PERATIS
American Civil Liberties
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NADINE TAUB
Women's Rights Litigation
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38

INDEX

	Page
Opinion Below	1
Statement of the Case	2
Question Presented	3
Argument	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

Coffin v. Secretary of Health, Education, and Welfare, ___ F. Supp. ___, No. 1890-73 (D.D.C. July 14, amended August 8, 1975)	4
Frontiero v. Richardson, 411 U.S. 677 (1973)	2, 4, 5, 6, 7, 9
Geduldig v. Aiello, 417 U.S. 484 (1974)	3
Goldfarb v. Secretary of Health, Education, and Welfare, 396 F. Supp. 308 (E.D.N.Y. 1975)	9
Jablon v. Secretary of Health, Education, and Welfare, 399 F. Supp. 118 (D.Md. 1975)	4
New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1975)	8

Page

Reed v. Reed, 404 U.S. 71 (1971)---- 4

Silbowitz v. Secretary of Health, Education, and Welfare, 397 F. Supp. 862 (S.D.Fla. 1975)---- 4

Stanton v. Stanton, 421 U.S. 7 (1975)---- 4

Weinberger v. Salfi, ___ U.S. ___, 95 S.Ct. 2457 (1975)---- 3

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)----3, 4, 6, 7, 8, 9, 10

Statutes:

42 U.S.C. §402(b)---- 2, 3

42 U.S.C. §402(c)(1)(C)---- 2, 3

42 U.S.C. §402(e)---- 2, 3

42 U.S.C. §402(f)(1)(D)---- 2, 3

Other Authorities:

Advisory Council on Social Security Report, S. Doc. No. 208, 80th Cong., 2d Sess. (1948)---- 6

Advisory Council on Social Security Reports (March 1975)---- 6, 8

Page

Bureau of Labor Statistics, U.S. Department of Labor, U.S. Working Women, A Chartbook, Bureau of Labor Statistics Bull. 1800 (1975)---- 5

Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. (1972)---- 6

S. Rep. No. 628, 74th Cong., 1st Sess. (1935)---- 6

U.S. Commission on Civil Rights, Toward Elimination of Sex-Based Differentials in the Social Security System (December 1974)---- 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
No. 75-699

F. David Mathews,
Secretary of Health, Education, and Welfare,

Appellant,

-v.-

Leon Goldfarb,

Appellee.

On Appeal from the United States District Court for the Eastern District of New York

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves to affirm the judgment of the district court.

OPINION BELOW

The opinion of the three-judge district court is reported at 396 F. Supp. 308 (E.D.N.Y. 1975).

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court declaring 42 U.S.C. §402(b), (c)(1)(C), (e), (f)(1)(D) unconstitutional insofar as it discriminates against individuals insured under social security and their spouses on the basis of sex.

Appellee Leon Goldfarb, retired and over seventy years of age, applied for monthly social security benefits on the earnings record of his deceased wife, Hannah Goldfarb. Leon Goldfarb is not an insured individual under social security. Hannah Goldfarb was a fully insured individual who, prior to her death in 1968, had paid social security taxes for some twenty-five years.

Leon Goldfarb's application was denied on the sole ground that he did not claim and failed to prove he received "at least one-half support from [his] wife when she died."[1] Such proof is required only when

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[1] To attract benefits for her spouse, the female wage earner must supply all of her own support and at least one-half of her husband's, generally 75 percent of family income. Cf. *Frontiero* v. *Richardson*, 411 U.S. 677, 680 n. 4 (1973). It is not enough, as appellant's presentation might suggest, Jurisdictional Statement filed by appellant, Secretary of Health, Education, and Welfare F. David Mathews, on November 12, 1975 [hereinafter cited as J.S.], 7 & n. 7, that she supply more than 50 percent of family income. Also questionable is appellant's delineation of pension and social security as an "either/or"--one "rather than" the other--proposition. (J.S. 5 n. 4.) A substantial and growing

the insured individual is female. Benefits to a spouse on a male insured individual's earnings record are not conditioned upon a support test. It is undisputed that, had the gender of these spouses been reversed, appellee's application would have been granted.

QUESTION PRESENTED

Whether 42 U.S.C. §402(b), (c)(1)(C), (e), (f)(1)(D), which authorizes social security benefits for a spouse on a male insured individual's earnings record without regard to dependency, but conditions benefits for the spouse of a female insured individual on proof of dependency, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

ARGUMENT

This is a gender discrimination-equal protection case.[2] The gender differentiation

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proportion of the nation's workers (those engaged in the private sector as well as those employed by state or municipal units that have opted into social security) are covered by both pension plan and social security.

[2] See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975). Appellant's reliance on *Weinberger* v. *Salfi*, ___ U.S. ___, 95 S. Ct. 2457 (1975), J.S. 4-5, is misplaced. No immutable birth characteristic (race, national origin, sex, legitimacy) figured in that case. Nor does "due process/conclusive presumption" analysis, the doctrine reexamined in *Salfi*, bear on the instant case, which involves "discrimination based on gender as such." See *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n. 20 (1974).

at issue is not rationally distinguishable from those struck down in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Four federal district courts have so ruled.[3] Furthermore, appellant's predecessor and the Solicitor General have acknowledged before this Court that the sex differentials involved in *Wiesenfeld* and *Frontiero* are "very closely analogous"[4] to, and reflect the same congressional judgment[5] as the differential at issue here. In these circumstances, and in light of this Court's precedent from *Reed* v. *Reed*, 404 U.S. 71 (1971), through *Stanton* v. *Stanton*, 421 U.S. 7 (1975), plenary consideration is not warranted.

Like the dependency test for male but not female military spouses invalidated in Sharron and Joseph Frontiero's case, the virtually identical test in the case at bar "deprive[s] women of protection for their families which men receive as a result of their employment." *Wiesenfeld*, 420 U.S. at 645.

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3 In addition to the instant case, see *Silbowitz* v. *Secretary of Health, Education, and Welfare*, 397 F. Supp. 862 (S.D. Fla. 1975); *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118 (D. Md. 1975)(three-judge court); *Coffin* v. *Secretary of Health, Education, and Welfare*, ___ F. Supp. ___, No. 1890-73 (D.D.C. July 14, amended August 8, 1975)(three-judge court).

4 Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld*.

5 Brief for the Appellees at 8, *Frontiero* v. *Richardson*.

Neither the alleged administrative economies of dividing workers and their spouses into breadwinning male/dependent female categories (J.S. 11 n. 10),[6] nor fiscal considerations

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6 Appellant's administrative cost argument is virtually a carbon copy of the one rejected in *Frontiero*. See Brief for the Appellees at 8-10, *Frontiero* v. *Richardson*; 411 U.S. at 689. Again, no concrete evidence is tendered to support the rationality of the assumption appellant attributes to Congress, that presuming women's dependency effects an economy. On the contrary, Government statistics point in an opposite direction. Husband and wife are both earners in close to half the nation's husband-wife families. On the average, the working wife supplies over half her own support. See U.S. Working Women, A Chartbook, U.S. Department of Labor, Bureau of Labor Statistics Bull. 1800, Charts 39, 40 (1975) (in 1973 both husband and wife were earners in 47% of husband-wife families; on the average, the wife's earnings accounted for 26% of family income, with a higher proportion in younger families and in families of minority races).

(J.S. 5),[7] suffice to justify the gender-based generalization that devalues the woman's efforts in the economic sector. See *Frontiero*, 411 U.S. at 688-90 & nn. 22, 23.[8] Nor should this Court entertain repetition of the argument, fully aired less than a year ago, that the *Frontiero* principle does not apply to a worker's social insurance. Compare J.S. 10 with Brief for the Appellant

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[7] Appellant's cost estimates (compare J.S. 5 with Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld*) contrast with the considerably lower sum entailed in implementing the recommendation of the 1975 Advisory Council on Social Security that "benefits for husbands and widowers should be provided without a support test as are benefits for wives and widows." Reports of the Advisory Council on Social Security 2, 37-38 (March 1975). Moreover, appellant's estimates may bear substantial downward adjustment if movement continues toward the recognized goal of universal social security coverage for all wage earners. See Advisory Council on Social Security Report, S. Doc. No. 208, 80th Cong., 2d Sess. 6 (1948). Compare S. Rep. No. 628, 74th Cong., 1st Sess. (1935) (social security system initially covered 50% of gainfully employed workers), with Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. 107-109 (1972) (social security covers about 90% of gainfully employed workers).

[8] As the U.S. Commission on Civil Rights has stated, "[t]here can be no more invidious form of sex discrimination" than the overt gender classifications remaining in the Social Security Act. Toward Elimination of Sex-Based Differentials in the Social Security System 7-10, 39 (December 1974).

at 17, *Weinberger* v. *Wiesenfeld*. And see *Frontiero*, 411 U.S. at 690. For Hannah Goldfarb, like Paula Wiesenfeld, "not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Wiesenfeld*, 420 U.S. at 645. In short, it is too late in the day to rehearse the proposition that overt gender classification is a permissible means to determine benefits due on the earnings record of a covered worker.

Appellant recalls this Court's recognition in *Wiesenfeld*, 420 U.S. at 645, that "[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses . . . is not entirely without empirical support." (J.S. 7.) Inexplicably, appellant declines to read on. As explained by Mr. Justice Brennan, 420 U.S. at 645:

> But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Mr. Justice Powell, writing for himself and Mr. Chief Justice Burger, underscored the point, 420 U.S. at 654-55:

> The statutory scheme . . . impermissibly discriminates against a female wage earner because it provides her family less protection than it provides the family of a

male wage earner, even though the family needs may be identical.[9]

Mindful of this Court's instruction not to accept administrative convenience or cost, purely budgetary considerations[10] or "the mere recitation of a benign, compensatory purpose" as an "automatic shield" for "archaic and over-broad" line drawing by gender,

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[9] Mr. Justice Powell also observed that *Wiesenfeld* is not properly explained as a "child care" case, for "the payment of benefits is not conditioned on the surviving parent's decision to remain at home." 420 U.S. at 654.

[10] The gender pigeonholing at issue here has scant relationship to the "strained resources" of the Social Security trust fund (J.S. 5). For the causes of the strains and burdens to which appellant points are demographic shifts in society--later entrance of young people into the work force, increased longevity, and lower birth rates. These shifts mean 1) fewer working years and longer retirements for social security taxpayers, and 2) a steady decline in the ratio of workers paying social security taxes to beneficiaries. See Reports of the Advisory Council on Social Security, *supra* note 7, at 61-63. Whatever the adjustments required to alleviate current strains and burdens, continued discrimination against wage-earning women cannot be urged as a rational or realistic means to help hold the line. Moreover, as this Court's precedent makes clear, cost saving cannot justify an otherwise invidious discrimination. See, e.g., *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973), summarily reversing 349 F. Supp. 491 (D.N.J. 1972); Brief for Appellee at 26-30, 45-49, *Weinberger* v. *Wiesenfeld*, *supra*.

Wiesenfeld, 420 U.S. at 643, 648,[11] the court below pointedly observed (396 F. Supp. at 309, Appendix to J.S. at 3a):

> Whatever may have been the ratio of contributions to family expenses of the Goldfarbs while they both worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple . . . retired and to her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men. The government has failed to justify this gender-based discrimination.

CONCLUSION

The gender lines in this case, *Frontiero* and *Wiesenfeld* are indeed "very closely

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[11] Plainly, the Court did not consider the absence of a support test the "fatal flaw" in *Wiesenfeld*. Cf. J.S. 9. Mr. Justice Brennan merely noted that flaw as one of two factors making the *Wiesenfeld* gender line "in some ways more pernicious" than the one in *Frontiero*. The other factor, present in this case as in *Wiesenfeld*, concerned the unfairness of requiring female workers to contribute to social security just as male workers do, but denying the female family coverage a similarly situated male would receive. 420 U.S. at 645.

analogous"[12] and cannot be distinguished on any principled basis. Because the Constitution "forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men," *Wiesenfeld*, 420 U.S. at 645, the determination of the district court, and the judgment based thereon should be summarily affirmed.

Respectfully submitted,

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12 *Supra*, p. 4 at n. 4.

FEB 20 PAGE 1

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No. 75-699

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

LEON GOLDFARB

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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In response to appellee's motion to affirm, we stress two principal points: first, the focus of equal protection analysis in a Social Security case such as this properly is upon the rationality of the denial of benefits to the category of potential beneficiaries of which the individual complainant is representative; second, the denial of benefits to appellee and other similarly situated men is rational. We take up these two points in reverse order.

1. The Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. 301 *et seq.*, provides a variety of dependency benefits for persons who were in fact, or, in some cases, may be presumed to have been, economically dependent upon a disabled, retired, or deceased wage-earner. In particular, the widower of a deceased female wage earner is entitled to such dependency benefits upon a showing,

inter alia, that his primary insurance amount under the Act is less than his deceased wife's and that he was in fact economically dependent upon his wife prior to her death. 42 U.S.C. 402(f)(1)(D); 42 U.S.C. (Supp. III) 402(f)(1)(E).

a. Appellee is a widower. Because he was employed during his working years by the federal government, his earnings were not subject to the FICA tax or covered by Social Security. See Complaint, para. 7; 26 U.S.C. 3121(b)(6); 42 U.S.C. 410(a)(6).[1] Since his wife's earnings as a nonpublic employee were covered by Social Security, her primary insurance amount under the Act was greater than his. But appellee had not been economically dependent upon his wife. Accordingly, he was ineligible for widower's insurance benefits after her death.

In this suit, appellee challenges the requirement that he show actual dependency as a condition of eligibility. He contends that male public employees, and other nondependent men whose lifetime incomes were not covered by Social Security, are constitutionally entitled to dependency benefits.

Appellee understandably does not suggest that extension of dependency benefits to such nondependent individuals would conduce to a more rational allocation of scarce

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[1]Men who were nondependent because of covered earnings ordinarily will be ineligible for either widower's or husband's insurance benefits because their primary insurance amounts will exceed the maximum allowable. This is especially true with regard to husband's insurance benefits, which, like the correlative wife's insurance benefits, are available only to individuals whose primary insurance amounts are less than half their spouses. See 42 U.S.C. (Supp. III) 402(b)(1)(D); 42 U.S.C. 402(c)(1)(D). Thus the principal group of nondependent men that would be affected by the removal of the dependency requirement would appear to be that of former public employees whose earnings were not covered by Social Security.

Social Security funds. Payments of dependency benefits to nondependent men such as appellee would not serve the underlying statutory objective of providing support for the dependents of disabled, retired, or deceased wage-earners. If appellee had worked for the same salary as a private rather than a public employee during his career, he would have been doubly ineligible for widower's insurance benefits: his primary insurance amount would have exceeded the maximum allowable (see note 1, *supra*), and he also would have failed the test of dependency. There is no reason related to the purposes and objectives of the Act why his public employment should change the result of ineligibility. There is no reason why, as a retired public employee, he should be entitled to both Social Security dependency benefits and his federal pension.[2]

b. Appellee's argument does not, of course, rest upon the rationality of extending dependency benefits to individuals such as himself but rather upon a perceived unfairness, of allegedly constitutional magnitude, in the different treatment of men and women under the Act: since a woman may receive widow's insurance benefits without proof of actual economic dependency on her deceased husband (42 U.S.C. 402(e)), men are comparatively disfavored under the statutory scheme for the distribution of benefits. Our answer to this line of argument is twofold: first, the different treatment of female beneficiaries may be justified by the social and economic realities that pertained during the working lives of the generation now of retirement age; second, to the extent that Congress has included nondependent wives within

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[2]Indeed, it could be argued that to award Social Security dependency benefits to nondependent federal pensioners such as appellee would be to discriminate against those recipients of Social Security pensions whose primary insurance amounts disqualify them from eligibility for dependency benefits.

the presumption of dependency for married women, the Constititution does not require that this Court enlarge upon that limited degree of over-inclusion by extending dependency benefits to nondependent men as well.

i. The Social Security Act presumes that a widow whose primary insurance amount is less than that of her deceased husband was economically dependent on him. Even for the generation of current beneficiaries—the only generation relevant to an assessment of the rationality of the allocation of benefits under the Act[3]—this statutory presumption will in some cases be inaccurate, since some nondependent widows, especially former public employees, will receive benefits as a consequence of that presumption. It seems highly probable, however, because of the social and economic realities that pertained during the working lives of individuals now of retirement age, that a widow of that age whose individual primary insurance benefits are less than her deceased husband's was in fact economically dependent upon her husband during his lifetime.[4] In view of this likely fact, it was not manifestly irrational for Congress to extend a presumption

[3]In attempting to show the irrationality of the presumption of dependency, appellee appears to rely solely upon statistics relating to the present national workforce. See Mot. to Aff. 5, n. 6. Those statistics shed no light upon the proportion of presently retired widows who were economically independent during their husbands' lifetimes. It is the latter proportion that bears upon the rationality of Congress' use of a presumption of dependency for the present generation of retirement-age women. It may be that in the future, as women now of working age enter retirement, the trend toward greater participation by women in the workforce will undercut the factual basis of that presumption, but that point has not yet been reached.

[4]The converse is not similarly likely to be true. We believe it highly likely that a large proportion of the men now of retirement age whose individual primary insurance amounts are less than their wives' were economically independent because of the receipt of incomes, through public employment or otherwise, that were not covered by Social Security.

of dependency to such women. Congress could have made the legislative judgment that a proof-of-support requirement for aged wives and widows with no primary benefits, or with smaller benefits than their husbands, would unnecessarily burden such women and unjustifiably increase the cost and administrative complexity of the program.[5] Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 776-777, 781-785.

ii. In any event, a degree of over-inclusion in the legislative standard for dependency would not justify judicial enlargement of the class of beneficiaries to embrace nondependent men as well. Due process, in cases such as this, requires only that the statutory classification be rationally related to permissible legislative objectives. The requirement that men prove actual dependency as a condition of eligibility for widower's insurance benefits is rationally related to the permissible legislative objective of restricting this general category of social welfare payments to the provision of support to the dependents of disabled, retired, or deceased wage-earners. The fact that Congress has adopted a standard that proves in particular cases to be over-inclusive in terms of the statutory objective does not constitutionally require that the objective be abandoned wholesale. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 776-777.[6]

[5]"[A] proof-of-support requirement for women as well as men would substantially increase the administrative complexity of the program * * *." Reports of the Advisory Council on Social Security 29 (1975), reprinted at Hearings on Financing the Social Security System before the Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 1st Sess., pp. 165, 207 (1975).

[6]In the last analysis, any unfairness caused by the discrepancies in treatment between men and women in a complex social welfare scheme such as that created by the Social Security Act must be finally resolved by Congress and not the courts. One recent proposal

2. Appellee seeks to characterize this as a case involving not the allocation of non-contractual benefits but rather the scope of insurance coverage: his principal argument is that to subject men, but not women, to a dependency test is to " 'deprive women of protection for their families which men receive as a result of their employment' " (Mot. to Aff. 4, quoting from *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645). Appellee fundamentally misconceives the nature of the Social Security program in analogizing it to a system of private insurance.

The Social Security system comprehends a bifurcated program of taxation and benefits. The system imposes income taxes on workers and excise taxes on their employers; it simultaneously appropriates those current revenues to provide Social Security benefits to former workers and their dependents in partial replacement of lost earnings. This Court has expressly noted that that system is basically unlike a system of private insurance *(Flemming* v. *Nestor,* 363 U.S. 603, 609-610):

> * * * [E]ach worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

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that may hold promise is that the dependency requirements for husbands' and widowers' benefits be removed but that "[*t*]*he law* [*also*] *be changed so that a pension based on work in noncovered employment would affect entitlement to and the amount of secondary benefits under social security in the same way that a primary social security benefit does.*" Reports of the Advisory Council on Social Security, *supra,* at 27, reprinted at Hearings, *supra,* at 205 (emphasis in original). Adoption of this proposal would eliminate the "gender differentiation" (Mot. to Aff. 3) of which appellee complains without the apparent impropriety that would be entailed in the payment of dependency benefits to appellee and other similarly situated retired public employees.

Accordingly, to ask, as appellee does here, whether one class of taxpayers is purchasing the same amount of "protection" or insurance coverage for its tax dollars as another class of taxpayers is to ask a question that should be irrelevant to the constitutionality of either the taxing provisions or the benefit provisions. Those tax dollars do not buy insurance coverage; they are simply the source of transfer payments to provide for the general welfare. "In essence, the plan transfers money from one generation to another with the amount taken from the one generation being measured by the other generation's benefit requirements." Reports of the Advisory Council on Social Security, *supra,* at 45, reprinted at Hearings, *supra,* at 223.

By asserting his deceased wife's claim to equal insurance protection as a Social Security taxpayer, appellee is in fact contesting the disposition of her tax payments; but Social Security taxes are not earmarked for the account of any individual taxpayer, and no taxpayer has standing to challenge the disposition of his taxes. *United States* v. *Richardson,* 418 U.S. 166; *Frothingham* v. *Mellon,* 262 U.S. 447.

Moreover, to view the question as if it turned on the comparability of insurance coverage under the Act is to invite invidious comparisons between wage-earners who have dependents and those who do not, and between wage-earners who have few dependents and those who have many. The Social Security system is simply not designed to equalize taxes and benefits, or to extend comparable "insurance protection" to all covered wage-earners. Indeed, it is not an "insurance" scheme at all.

It is a system for redistributing income from current wage-earners to former wage-earners and their dependents, and the constitutionality of its provisions must be judged in that light and not from the oblique viewpoint of taxpayers who claim to have been shortchanged. In short, the focus of equal protection analysis must be upon the rationality of the allocation of benefits among potential beneficiaries, not upon the allocation of insurance "protection" among taxpayers.[7] And, as we have shown (pp. 1-6, *supra*), the allocation of benefits is rational.

For the reasons stated above and in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[7]It is, however, instructive that female wage-earners as a class appear to be "over-protected" in relation to male wage-earners. We are informed by the Office of the Chief Actuary, Social Security Administration, that female wage-earners, and their employers on their behalf, pay only 28 percent of all FICA taxes, whereas 34 percent of all Social Security benefits are paid to retired female wage-earners and their dependents.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional and statutory provisions involved	2
Statement	4
Summary of argument	5
Argument	8
The Social Security Act's requirement that a widower, but not a widow, have been financially dependent upon the deceased spouse as a condition of eligibility for survivor's benefits is constitutional	8
Introduction	9
A. The differences between the probable needs of the present retirement generation of widows and widowers provide a rational basis for the different standard of eligibility for the survivors benefits Congress defined for each class	15
1. The allowance of widow's benefits without proof of dependency rationally serves the probable needs of aged widows	16
2. The condition that widower's benefits are available only where the wife in fact supported the widower rationally reflects the needs of aged widowers as a class	23

208-338—76——1

Argument—Continued
3. The different treatment accorded widows and widowers does not deny due process ---------- Page 28
B. Extending survivors insurance benefits to otherwise eligible non-dependent widowers would further no rational purpose ---------- 36
Conclusion ---------- 40
Appendix ---------- 1A

CITATIONS

Cases:
Dandridge v. *Williams*, 397 U.S. 471---- 30
Flemming v. *Nestor*, 363 U.S. 603------- 6, 7, 14, 26, 30, 31
Frontiero v. *Richardson*, 411 U.S. 677--- *passim*
Geduldig v. *Aiello*, 417 U.S. 484---------- 7, 28
Kahn v. *Shevin*, 416 U.S. 351---------- 6, 10, 19, 23, 34, 35, 40
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 ---------- 29
McGowan v. *Maryland*, 366 U.S. 420------ 15
Metropolis Theatre Co. v. *City of Chicago*, 228 U.S. 61---------- 30
Mourning v. *Family Publications Services, Inc.*, 411 U.S. 356---------- 22
Reed v. *Reed*, 404 U.S. 71---------- 10, 11, 12
Richardson v. *Belcher*, 404 U.S. 78------ 6, 14, 30
San Antonio School District v. *Rodriguez*, 411 U.S. 1---------- 7, 30
Schlesinger v. *Ballard*, 419 U.S. 498---- 6, 10, 40
Weinberger v. *Salfi*, 422 U.S. 749-------- 6, 7, 14, 22, 23, 31, 32, 39
Weinberger v. *Wiesenfeld*, 420 U.S. 636-- *passim*

Constitution and statutes:
Constitution of the United States, Page
Fifth Amendment ---------- 2, 5, 9
Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. 401 *et seq.*:
Section 202(c), 42 U.S.C. 402(c)-----
Section 202(c)(1), 42 U.S.C. 402 (c)(1) ---------- 2
Section 202(c)(1)(D), 42 U.S.C. 402 (c)(1)(D) ---------- 36
Section 202(d), 42 U.S.C. 402(d)---- 17
Section 202(d)(3), 42 U.S.C. 402(d) (3) ---------- 22
Section 202(e), 42 U.S.C. (Supp. IV) 402(e) ---------- 5
Section 202(e)(1)(D), 42 U.S.C. (Supp. IV) 402(e)(1)(D)-------- 17, 33
Section 202(f), 42 U.S.C. 402(f)----- 2, 4
Section 202(f)(1), 42 U.S.C. (Supp. IV) 402(f)(1) ---------- 3
Section 202(f)(1) (A) to (E), 42 U.S.C. (Supp. IV) 402(f)(1) (A) to (E) ---------- 4
Section 201(f)(1)(D), 42 U.S.C. (Supp. IV) 402(f)(1)(D)-------- 5
Section 202(f)(1)(E), 42 U.S.C. (Supp. IV) 402(f)(1)(E)----- 4–5, 33, 36
Section 209(n), 402 U.S.C. 409(n)--- 21
Section 210, 42 U.S.C. 410---------- 33
Section 215, 42 U.S.C. (Supp. IV) 415 ---------- 4
Section 216(h)(2), 42 U.S.C. 416(h) (2) ---------- 21
Section 216(h)(3), 42 U.S.C. 416 (h)(3) ---------- 26

Constitution and statutes—Continued
Social Security Act—Continued
Page
Section 218, 42 U.S.C. 418 ---------- 33
Section 706, 42 U.S.C. 907 ---------- 23
53 Stat. 1364 ---------- 9, 17
53 Stat. 1365 ---------- 17
53 Stat. 1378 ---------- 21
64 Stat. 483–485 ---------- 9, 24
64 Stat. 485 ---------- 25
64 Stat. 511 ---------- 21
64 Stat. 512 ---------- 25, 26
71 Stat. 518 ---------- 21, 26
5 U.S.C. 8301–8348 ---------- 33
10 U.S.C. 1072 ---------- 10
10 U.S.C. 1076 ---------- 10
28 U.S.C. 2282 ---------- 5
37 U.S.C. 401 ---------- 10
37 U.S.C. 403 ---------- 10
45 U.S.C. 228a–228z ---------- 33
Miscellaneous:
Bureau of the Census, A Statistical Portrait of Women in the United States, Special Studies Series, P. 23, No. 58 (1976) ---------- 20, 26, 27, 33, 34, 35
103 Cong. Rec. 15301–15302 (1957) ------ 21
Gunther, Cases and Materials on *Constitutional Law* (1975) ---------- 15
Hearings before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, on Economic Problems of Aging Women, 94th Cong., 1st Sess. (1975) ---------- 35
H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939) ---------- 17
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Miscellaneous—Continued
Reports of the Quadrennial Advisory Council on Social Security, H.R. Doc. No. 94–75, 94th Cong., 1st Sess. (1975) -- Page 23, 30, 31, 39
Report of the Committee on Economic Security, H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939) ---------- 18
S. Doc. No. 208, 80th Cong., 2d Sess. (1949) - 24
S. Rep. No. 1669, 81st Cong., 2d Sess. (1950) ---------- 25
Sixteenth Census of the United States, 1940, Vol. III ---------- 20
Social Security Claims Manual:
Section 2604 ---------- 37
Section 2605 ---------- 37
Section 2625 ---------- 25
Section 2628 ---------- 25
Women and Social Security: Adapting to a New Era, a Working Paper Prepared by the Task Force on Women and Social Security for the use of the Special Committee on Aging, United States Senate, Committee Print, 94th Cong., 1st Sess. (1975) ---------- 20, 27, 35

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

LEON GOLDFARB

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum and order of the district court (J.S. App. A) are reported at 396 F. Supp. 308.

JURISDICTION

The order of the three-judge district court declaring portions of 42 U.S.C. 402 unconstitutional was entered on June 17, 1975 (J.S. App. A). A notice of appeal to this Court (J.S. App. B) was filed on July 15, 1975. The time for docketing the appeal was extended by order of Mr. Justice Marshall first to Octo-

ber 13, 1975, and then to November 12, 1975. The jurisdictional statement was filed on the latter date. On February 23, 1976, this Court noted probable jurisdiction (A. 24). The jurisdiction of this Court is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8.

QUESTION PRESENTED

Whether Section 202(f) of the Social Security Act invidiously discriminates because it provides for widower's insurance benefits only if the widower had received at least one-half of his support from his deceased wife, whereas widow's insurance benefits are payable even though the widow had not received at least one-half of her support from her deceased husband.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 220(c)(1) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. 402(c)(1), in pertinent part provides:

> The husband * * * of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62,
>
> (C) was receiving at least one-half of his support * * * from such individual [at the

> time she became entitled to old-age or disablity benefits—
>
> * * * * *
>
> and filed proof of such report within two years after the month in which * * * she became entitled to such benefits, and
>
> (D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,
>
> shall be entitled to a husband's insurance benefit * * *.

Section 202(f)(1) of the Social Security Act, as amended, 42 U.S.C. (Supp. IV) 402(f)(1), in pertinent part provides:

> The widower * * * of an individual who died a fully insured individual, if such widower—
>
> (A) has not remarried,
>
> * * * * *
>
> (B)(i) has attained age 60, or (ii) has attained age 50 * * * and is under a disability* * *,
>
> (C) has filed application for widower's insurance benefits * * *,
>
> (D)(i) was receiving at least one-half of his support * * * from such individual at the time of her death, or if such individual had a period of disability which did not end prior to the month in which she died, at the time such period began or at the time

of her death, and filed proof of such support within two years after the date of such death * * * , or (ii) was receiving at least one-half of his support * * * from such individual at the time she became entitled to old-age * * * insurance benefits * * *, and filed proof of such support within two years after the month in which she became entitled to such benefits * * * and,

(E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit * * *.

STATEMENT

Appellee, after the death of his wife, applied to the Social Security Administration for widower's insurance benefits pursuant to Section 202(f) of the Social Security Act, as amended, 42 U.S.C. 402(f). Since appellee's public employment had not been covered by social security (J. S. App. A, p. 2a), he satisfied the requirement, not met by most men, that he not be entitled to old-age insurance benefits equal to or in excess of his deceased wife's primary insurance amount.[1] 42 U.S.C. (Supp. IV) 402(f)(1)(E). His application for widower's benefits was nevertheless denied because he failed to establish, as required by Section 202(f)(1)(D), that he had been "receiving at least one-half of his support * * * from [his wife] at the time of her death * * * or * * * at the time she became entitled to old-age or disability insurance benefits."

Appellee then instituted this suit in the United States District Court for the Eastern District of New York, requesting that that dependency requirement be declared unconstitutional, on the ground that no similar showing of dependency is required as a condition of eligibility for widow's insurance benefits (A. 5–17).

A three-judge district court was convened pursuant to 28 U.S.C. 2282. The court granted the requested relief on the basis of this Court's decision in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, and *Frontiero* v. *Richardson*, 411 U.S. 677 (J. S. App. A).

SUMMARY OF ARGUMENT

Under the equal protection component of the Due Process Clause of the Fifth Amendment, legislative

---

[1] "Primary insurance amount" is the maximum monthly benefit payable to a retired worker covered by social security on the basis of his or her own earnings record. Section 215, 42 U.S.C. (Supp IV) 415. Beneficiaries other than the wage earner receive "secondary" or "derivative" benefits.

The other conditions of eligibility for widower's insurance benefits are set forth in Section 202(f)(1)(A) to (E). In particular, the widower may not have remarried and must have attained age 60 or, if disabled, age 50.

A woman in appellee's position, who applied for widow's benefits, would have been required to meet essentially the same conditions of eligibility, except that she would not have had to prove that she had been receiving at least one-half of her support from her deceased husband. See Section 202(e) of the Act, as amended 42 U.S.C. (Supp. IV) 402(e).

classifications for social and economic welfare programs like social security are constitutional if the classification has a rational basis reasonably related to the legislative purpose which motivated it. *Weinberger* v. *Salfi,* 422 U.S. 749, 768–769; *Richardson* v. *Belcher,* 404 U.S. 78, 81, 84; *Flemming* v. *Nestor,* 363 U.S. 603, 611. Gender-based classifications which meet this test are no exception. Cf. *Kahn* v. *Shevin,* 416 U.S. 351; *Schlesinger* v. *Ballard,* 419 U.S. 498.

In enacting a program of survivors' benefits for aged widows in 1939, and for aged widowers in 1950, Congress defined different standards of eligibility because of the differing social welfare needs of each class. Those differences arose from the fact that a very substantial proportion of aged widows found themselves in dire need upon the death of their spouse, while aged widowers were better situated because they had generally been self-supporting over most of their working lives. It was therefore rational for Congress in 1939 to provide aged widows with benefits without their having to prove that their husbands had supported them. Such a requirement would have been an unnecessary burden on the vast majority of such widows, who would qualify in any event; and it would have gratuitously increased the administrative complexity of the widows' benefit program.

In contrast, since the vast majority of widowers were not dependent on their spouses, it was rational for Congress to conclude in 1950 that the probable needs of this class warranted extension of survivors'

benefits to widowers only when they had been dependent on their wives for a substantial part of their support.

Even if there is some imperfection when the two classifications are compared, because some non-dependent widows, but no non-dependent widowers, receive survivors' benefits, this does not render the statute unconstitutional. *Weinberger* v. *Salfi, supra,* 422 U.S. at 777. Mathematical precision is not required for otherwise valid legislative classification. In social welfare programs, Congress may adopt a rough accommodation of interests, needs, and costs in an effort to arrive at practical and workable solutions. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 55; *Geduldig* v. *Aiello,* 417 U.S. 484, 495; Cf. *Flemming* v. *Nestor, supra,* 363 U.S. at 608–611.

Neither *Frontiero* v. *Richardson,* 411 U.S. 677, nor *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, renders the half-support requirement for widowers unconstitutional. *Frontiero* involved a classification which allowed married servicemen a pay supplement for their spouses, but denied such a supplement to married servicewomen unless they furnished half their spouses' support. The instant case does not involve the denial to women in the same situation as men equal compensation for equal work; it involves standards of eligibility for social welfare benefits reflecting differences in the probable social welfare needs of aged widows and widowers.

These differences also render *Wiesenfeld* inapplicable. In that case young widows, but not young

widowers, with children were eligible for a special survivors' benefit. This Court found that the legislative objective was not to meet the needs of the surviving parent, but to meet the need of the children for parental care. 420 U.S. at 648–649. That need was the same whether the father or the mother survived. Hence, it was irrational to furnish a surviving parent's benefit for the children of young widows, but to deny it completely for the children of young widowers.

Extension of widowers' benefits to non-dependent men would serve no rational purpose. On the contrary, it would furnish them a windfall. This is particularly true for men like appellee, who have little or no social security old-age benefits because they were covered by an alternative system such as federal civil service retirement. Extending benefits to such non-dependent men is unrelated to their probable social welfare needs. The district court's reasoning, which would extend benefits to non-dependent aged husbands, as well as widowers, would increase the current cost to the working generation, now paying for the benefits of the retired generation, by $447 million. Yet this enormous cost would be unrelated to the purpose of the statute.

ARGUMENT

THE SOCIAL SECURITY ACT'S REQUIREMENT THAT A WIDOWER, BUT NOT A WIDOW, HAVE BEEN FINANCIALLY DEPENDENT UPON THE DECEASED SPOUSE AS A CONDITION OF ELIGIBILITY FOR SURVIVOR'S BENEFITS IS CONSTITUTIONAL

INTRODUCTION

As will be developed more fully below (pp. 16–28, *infra*), the social security programs of survivor's benefits for widows and for widowers have different origins and have evolved separately over the years. The program of widow's insurance benefits was instituted in 1939. 53 Stat. 1364. Survivor's insurance benefits were not made available to widowers until 1950. 64 Stat. 483–485. The conditions of eligibility under the two programs, which have been subject to considerable revision over the years, have always been somewhat different (see pp. 17, 21, 24, 25, *infra*). At present, the principal remaining difference between the two programs is that an otherwise eligible widower must have been receiving at least one-half of his support from his wife, either at the time of her death or when she had become eligible for old-age or disability insurance benefits, whereas a widow is not subject to a comparable requirement.

Appellee challenges the constitutionality of this remaining difference between the two programs. His position, seemingly, is that the Constitution, through the mandate of equal protection inherent in the Fifth Amendment's Due Process Clause, requires that the benefit provisions of the Social Security Act be free of any gender-based distinctions (see Mot. to Aff. 7). His principal reliance is upon *Frontiero* v. *Richardson*, 411 U.S. 677, and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636. But a close study of the opinions in those

cases demonstrates that they do not govern the outcome of this case.

In *Frontiero,* the Court held unconstitutional certain statutes (37 U.S.C. 401 and 403; 10 U.S.C. 1072 and 1076) that provided a married serviceman with a pay supplement (increased quarters allowance and dependents' medical and dental benefits), on account of his status as a husband, but denied such pay supplement to a married servicewoman unless she furnished more than one-half of her husband's support. The instant case does not involve a similar denial to women of equal compensation for equal work. Rather, we show, *infra,* pp. 28–36, it involves differing standards of eligibility for survivors' benefits, reflecting differences in the probable social welfare needs of aged married men and women, which justify different standards of eligibility for secondary benefits derived from their spouse's social security coverage.

There was no opinion for the Court in *Frontiero.* The plurality opinion of Mr. Justice Brennan rested upon the premise "that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. That premise was not accepted by a majority of the Court in *Frontiero,* and it has since been explicitly rejected by the Court. *Kahn* v. *Shevin,* 416 U.S. 351, 355–356. See also *Schlesinger* v. *Ballard,* 419 U.S. 498; *Reed* v. *Reed,* 404 U.S. 71.

The concurring opinions in *Frontiero* relied, without elaboration, upon *Reed* v. *Reed, supra.* That case involved an Idaho statute that preferred males to females in the selection of the individual to administer a decedent's estate. The Court held that that preference, the purpose of which was "merely to accomplish the elimination of hearings [to determine whether the husband or wife would do the more capable job of administration]" (404 U.S. at 76), was constitutionally impermissible. The nature of the classification, whether sexual or otherwise, was irrelevant to the analysis in *Reed,* which was based not upon special considerations relating to sexual classifications, but upon the long-settled rule that "[t]he Equal Protection Clause * * * den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." 404 U.S. at 75–76.

At bottom, therefore, *Reed* stands for the unexceptionable proposition that in a contest between two otherwise similarly situated individuals over a single, indivisible, judicially conferred benefit, the state's interest in furthering administrative convenience by avoiding an adjudication of respective qualifications is a constitutionally inadequate basis for granting the benefit to the one instead of to the other.

That proposition does not bear upon this case. First, this case, unlike *Reed,* does not involve competition between two individuals for a single, indivisible bene-

208-338—76——3

fit. But more significantly, appellee here, unlike the wife in *Reed*, was not denied a benefit on the basis of administrative convenience. To the contrary, the denial of benefits reflected the congressional judgment that aged widowers as a class were sufficiently likely not to be dependent upon their wives that it was appropriate to deny them benefits unless they were in fact dependent. Thus, also unlike the wife in *Reed*, appelleee was afforded the opportunity, not available in *Reed*, of proving entitlement by showing that he was dependent upon his wife. For all of these reasons, the separate opinions in *Frontiero* offer no authoritative guidance for the resolution of the question presented here.

Nor is *Wiesenfeld* dispositive here. There the Court held unconstitutional a legislative classification that denied father's insurance benefits to surviving widowers with children in their care, while authorizing similar mother's benefits to similarly situated widows. The Court concluded that the restriction of benefits to surviving mothers was not rationally related to the underlying legislative purpose, which the Court determined to be "to provide children deprived of one parent with the opportunity for the personal attention of the other * * *" (420 U.S. at 648–649). The Court reasoned (*id.* at 651–652):

> Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of

> the sex of the surviving parent. * * * [T]his result makes no sense. * * * It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.[2]

---

[2] The Court further stated that the statutory classification in *Wiesenfeld* was "more pernicious" than that in *Frontiero* (420 U.S. at 645). Whereas "it was open to the servicewoman under the statutes invalidated in *Frontiero* to prove that her husband was in fact dependent upon her * * *[an applicant for father's benefits] was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child" (*ibid.*). There is, of course, no comparable defect in the statutory classification challenged here. See text, *supra*, p. 9.

The Court in *Wiesenfeld* also observed that the rationality of the statutory classification should be viewed from the perspective of the covered wage earner as well as that of the prospective beneficiary (420 U.S. at 645). But closer scrutiny of the *Wiesenfeld* opinion has persuaded us that, at least in cases such as this, the difference in perspective is one of merely rhetorical significance: the fundamental equal protection analysis is the same, whether the case is viewed from the vantage point of the wage earner or the beneficiary. The Court concluded in *Wiesenfeld* that, from the perspective of the wage earner, "benefits must be distributed according to classifications which do not without sufficient justification differentiate among *covered employees* solely on the basis of sex" (420 U.S. at 647) (emphasis added). Since under the statutory classification in *Wisenfeld*, as here, the sex of the covered employee was necessarily, in all hypothetical applications, the opposite of that of the beneficiary, the Court's statement is analytically indistinguishable in this context from the same statement with the term "potential beneficiaries" substituted for "covered employees": "benefits must be distributed according to classifications which do not without sufficient justification differentiate among *potential beneficiaries* solely on the basis of sex." That, in turn, is simply a statement, especially if proper scope is given to the clause "without sufficient justification," of the "rational basis" test applicable to this case.

The Court in *Wiesenfeld* thus focused not on the probable needs of young fathers, but on the probable need of the children for parental care.

That line of reasoning is inapplicable here. The widower's and widow's insurance programs respond to different welfare needs from those the Court found to underlie the statute challenged in *Wiesenfeld*. The purpose of the widower's and widow's insurance programs is to meet the probable economic needs of the individual elderly beneficiary; the benefits they provide are intended in large part to replace the economic support lost by a dependent elderly spouse upon the death of the wage earner, and they are tailored to achieve that objective (see pp. 16–28, *infra*).

Since neither *Frontiero* nor *Wiesenfeld* provides useful instruction with respect to the question presented here, guidance must be sought elsewhere. We begin with the settled proposition that "when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger* v. *Salfi*, 422 U.S. 749, 768 (quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611). As this Court noted in *Richardson* v. *Belcher*, 404 U.S. 78, 81:

> A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is

> "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment.

The question here, therefore, is whether the challenged statutory classification has a rational justification that may reasonably be considered to have been within the contemplation of Congress. For the reasons we now discuss, we believe that that question must be answered in the affirmative.

A. THE DIFFERENCES BETWEEN THE PROBABLE NEEDS OF THE PRESENT RETIREMENT GENERATION OF WIDOWS AND WIDOWERS PROVIDE A RATIONAL BASIS FOR THE DIFFERENT STANDARD OF ELIGIBILITY FOR THE SURVIVORS BENEFITS CONGRESS PROVIDED FOR EACH CLASS

In order to determine whether differing statutory classifications are reasonable, it is first necessary to define correctly the classes involved, and to examine the reasons, legislatively articulated or judicially constructed,[3] which independently support the classifications. It is then necessary to compare the differences to determine whether they are justified in light of the statutory purposes. When this analysis is applied to

[3] Compare *McGowan* v. *Maryland*, 366 U.S. 420, 426 with *Weinberger* v. *Wiesenfeld*, supra, 420 U.S. at 648, n. 16. See Gunther, *Cases and Materials on Constitutional Law*, p. 662 (1975).

the respective social security benefits programs for aged widows and widowers of the present retirement generation, *i.e.*, over-60, striking differences in the probable benefit needs of each class appear, which justify the different treatment Congress provides for those two classes.

These factual differences in probable need are rooted in the social and economic realities which existed during the working lives of the great majority of the men and women who make up each class, including the role they played in the labor force, and the extent of the average income contributions by husbands and wives of this generation to the support of the family as a whole. In the discussion which follows, we separately analyze the origins of the programs for each class of beneficiaries in the light of the legislative purpose, which was to meet the probable benefit needs of the respective class. We then show that when these analyses are compared, the differences between the requirements for widows and widowers justify the statute's requirement that aged widowers, but not aged widows, must have depended upon their spouses for at least half their support in order to obtain survivors' benefits.

1. THE ALLOWANCE OF WIDOW'S BENEFITS WITHOUT PROOF OF DEPENDENCY RATIONALLY SERVES THE PROBABLE NEEDS OF AGED WIDOWS

As originally enacted in 1935, the old age provisions of the Social Security Act (49 Stat. 622) made no provision for continuing benefit payments to anyone

except the wage earner. In 1939 the Act was amended to provide benefits derived from the wage earner's coverage to other members of the family including wives, widows, children, orphans, and surviving dependent parents. *Weinberger* v. *Wiesenfeld, supra,* 420 U.S. at 643. Husbands and widowers were not included at this time. 53 Stat. 1364. H.R. Rep. No. 728, 76th Cong., 1st Sess. 7, 111 (1939).

Under Section 202(d) of the Act as amended in 1939 (53 Stat. 1365), every widow of a fully insured individual who (1) had not remarried, (2) had reached the age of 65, (3) was living with the insured individual at the time of his death, and (4) was not entitled to primary insurance benefits on her own account, or whose benefits were less than ¾ of her husband's primary insurance benefits, was entitled to a widow's benefit.[4] The purpose of these provisions, like other amendments creating derivative benefits for members of the wage earner's family, was to meet the probable needs of the classes of beneficiaries defined. Of these, Congress determined that the presumptive needs of aged widows were particularly severe. The House Committee explained that (H.R. Rep. No. 728, *supra,* at 7, 11 emphasis added):

> Under a social-insurance plan the primary purpose is to pay benefits in accordance with the *probable needs* of the beneficiaries rather

[4] Under present law, the widow is entitled to monthly benefits if she is aged 60 (50, if disabled) and "is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of" her deceased husband. Section 202(e)(1)(D), as amended, 42 U.S.C. (Supp. IV) 402(e)(1)(D).

than to make payments to the estate of a deceased person regardless of whether or not he leaves dependents. * * *

* * * * *

* * * The new plan will eliminate most lump-sum benefits and will substitute monthly benefits for those groups of survivors whose *probable need* is greatest. These groups are widows over 65, widows with children, orphans, and dependent parents over 65.

Congress thus provided benefits on the basis of the probable needs of aged widows as a class.[5] It eschewed inquiry into the individual financial status of the particular aged widow, except to the extent of a determination of the level of her own primary insurance benefits. The class of aged widows, therefore, was certain to include some members who had no need for benefits based on their husbands' coverage, *i.e.,* widows with an independent income or pensions from non-social security sources which rendered them non-dependent.

Thus from the beginning of the program for surviving widows in 1939, Congress included some non-

[5] The proposal for providing benefits to aged widows as a class on the basis of the class's presumptive needs originated in the 1938 Report of the Social Security Board, which President Roosevelt transmitted to Congress. See Report of the Committee on Economic Security, H.R. Doc. No. 110, 76th Cong., 1st Sess. 7 (1939). The Board reasoned that (*ibid.;* emphasis added): "Under a social insurance system the primary purpose should be to pay benefits in accordance with the *presumptive needs* of the beneficiaries, * * *. The payment of monthly benefits to widows and orphans, who are the two chief classes of dependent survivors, would furnish more significant protection than does the payment of lump-sum benefits."

dependent women within the class of aged widows to whom it gave benefits. It obviously assumed that this non-dependent sub-class was relatively small. Its primary focus was upon the probable need of the great majority of aged widows, as a class, for a source of income to replace the support contributed by their husbands.

This Court has recognized that need. In *Kahn* v. *Shevin,* 416 U.S. 315, 353–354, it noted:

> Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. * * * The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.

These observations about the condition of aged women were no less apt in 1939 than when *Kahn* v. *Shevin* was decided in 1974.

As of 1939, and for many years thereafter, comparatively few wives were actually not dependent on their husbands. In 1940, out of all married workers actually living with their spouses, only 3.8 million women participated in the labor force, as against 26.2 million men.[6] Ten years later, in 1950, only 26

[6] *Sixteenth Census of the United States, 1940,* Vol. III, Table 6, p. 22.

such married women participated in the labor force for every 100 married men.[7] For widows of the present retirement generation, past discrimination in the job market and dependency on their spouses for support have caused severe adversity.

Thus, it has been observed (Women and Social Security: Adapting to a New Era, a Working Paper prepared by the Task Force on Women and Social Security for the use of the Special Committee on Aging, United States Senate,[8] Committee Print, 94th Cong., 1st Sess. 42 (1975)):

> As a group, aged widows have traditionally been the most economically deprived of the segments of the aged population. Older women living alone, the overwhelming proportion of whom are widows, had median incomes of $2,642 in 1973 when 33.4 percent of them lived below the poverty level.

The grave threat of poverty confronting aging widows is only one aspect "of [a] retirement income crisis now affect[ing] millions of aged and aging women, and threaten[ing] to engulf many more." *Id.* at 37. Thus even today (*ibid.*):

> The likelihood of being poor is considerably greater for elderly females than for aged males. More than two out of every three poor persons in the 65-plus age category are women. * * *

[7] *Bureau of the Census, A Statistical Portrait of Women in the United States, Special Studies Series P. 23, No. 58* (1976) (hereinafter "*Women*"), p. 30, table 7–4.

[8] Hereinafter cited as "Task Force Report".

> Poverty among elderly men, on the other hand, was markedly lower * * *.

In view of that general situation, Congress dispensed with any requirement that most aged widows prove that their husbands contributed to their support, and provided benefits to all members of the class who met the statutory criteria. In the original 1939 Act, this group was defined to include all widows living in the same household with their husband—which was by far the largest category. Widows who had been living apart from their husbands, however, were, under the 1939 definition of "living with" (Section 209(n), 53 Stat. 1378), also able to obtain benefits, by showing that deceased husbands had in fact contributed to their support.

Although that provision for the separated wife was restated in 1950,[9] it was eliminated in 1957, so that all otherwise eligible aged widows, regardless of whether they were actually living with their husbands, were allowed benefits without having to prove support. 71 Stat. 518. Congress apparently determined that this distinction in factors of eligibility between the two sub-classes of widows on the basis of residence was inconsistent with the original, and continuing purpose of widows' benefits.[10] Moreover, this proof-of-support requirement for women separated from their

[9] Section 216(h)(2), 64 Stat. 511.

[10] The amendment eliminating the "living with" requirement was added to the 1957 Social Security Amendments on the floor of the Senate. 103 Cong. Rec. 15301–15302 (1957). No explanations of the reason for eliminating this provision were given.

husbands unduly burdened those widows without making any meaningful contribution toward weeding out the non-needy, for such women may well have been among the neediest of all.

By eliminating the proof-of-support requirement for all widows, Congress furthered its basic design of providing benefits to widows as a class on the basis of the probable needs of the class, rather than on the basis of support contributed by their spouses. Of course, replacement of loss of support was a major factor underlying benefits for aged widows in 1939, in 1957, and today. But Congress was focusing on the widespread poverty of aged widows and integrating a remedy for that poverty into the social security scheme. It did not rely on an individual means test which could be satisfied by a legislatively prescribed presumption of dependency. (Cf. *Weinberger* v. *Salfi, supra,* 422 U.S. at 770–774.) Instead, it established a substantive standard of eligibility for the class as a whole, analogous to the substantive rules involved in *Weinberger* v. *Salfi, supra,* and *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 377.[11]

[11] Significantly, Congress did not use any terms indicating that it intended to create a presumption of dependency as it did, for example, for children who are "deemed dependent" under specified circumstances. Section 202(d)(3), 42 U.S.C. 402(d)(3).

Because the probable-need standard is so closely related to dependence upon the support of the husband in the majority of cases, it is convenient to describe the statute as presuming that married women of retirement age are dependent. Since use of this term confuses the presumption of need on which Congress relied, with the legislative prescription of a presumption, we do not use it in this brief.

Thus, Congress determined not to impose on the great majority of widows, who were in fact in desperate need as a result of the loss of their spouse's support, a dependency requirement which at best would weed out a small percentage of the non-needy.

As the Advisory Council on Social Security[12] recently observed:[13]

> [A] proof-of-support requirement for women as well as men would substantially increase the administrative complexity of the program and would require large numbers of dependent women to establish dependency on the husband in order to get exactly the same benefits they can get under present law.

Instead, by establishing a program of benefits for aged widows which dispensed with proof of support, Congress enacted a statute "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Kahn* v. *Shevin,* 416 U.S. 351, 355. Cf. *Weinberger* v. *Salfi, supra,* 422 U.S. at 776–777, 781–785.

[12] The Advisory Council is a statutory body required to submit to Congress a quadrennial review of the entire social security program. Section 706, 42 U.S.C. 907.

[13] Reports of the Quadrennial Advisory Council on Social Security, H.R. Doc. No. 94–75, 94th Cong., 1st Sess. 29 (1975) (hereinafter, "Advisory Council Report, 1975").

2. THE CONDITION THAT WIDOWER'S BENEFITS ARE AVAILABLE ONLY WHERE THE WIFE IN FACT SUPPORTED THE WIDOWER RATIONALLY REFLECTS THE NEEDS OF AGED WIDOWERS AS A CLASS

Viewed in terms of the probable needs of aged widowers as a class, the proof-of-support requirement is rational. In 1950, Congress extended benefits to the aged dependent husbands and widowers of women wage earners. 64 Stat. 483–485. The report of the 1949 Advisory Council on Social Security had recommended the provision of benefits to those recipients, stating (S. Doc. No. 208, 80th Cong., 2d Sess. 38 (1949):

> [S]upplementary benefits should be payable to the dependent husband (at age 65 or over) of a female primary beneficiary who was currently insured at the time she attained age 60. These husband's benefits would be comparable to the present wife's benefits for wives of male primary beneficiaries. Such benefits will be payable in relatively few cases, however, because the man would receive only the larger of the husband's benefit or his own primary benefit.

As enacted in 1950, husbands and widowers benefits were made available under the same rationale—the probable need of the class—that had been invoked for wives and widows. But those probable needs were different. The standard of eligibility for benefits was therefore defined differently to provide only for those widowers who were presumptively needy. The qualifications were the same as for widows, as redefined in the 1950 Act, including the requirements that the husband must have attained retirement age, and have been "living with" the wife at the time of her death,

in the sense of being a member of the same household or receiving contributions from her toward his support (64 Stat. 485, 512). As in the case of widows, widowers were not eligible unless either they were not entitled to old-age insurance benefits on their own account, or if entitled to such benefits, the amounts were less than their spouses' primary benefits.

Unlike aged widows, however, aged widowers were entitled to benefits only if they were receiving at least one-half of their support from their wife at the time she died or became entitled to old-age insurance benefits. As a practical matter, only husbands whose wives contribute 75 percent of the family income meet this test[14] (*i.e.*, half for her own support, and one-

[14] Congress intended that the half-support requirement be "subject to regulations of the [Social Security] Administrator in order to permit the latitude necessary to enable him to determine the existence of true support, rather than support or lack of it resulting from income attributable to a spouse under community property laws." S. Rep. No. 1669, 81st Cong., 2d Sess. 63 (1950). Ordinarily, the Administration assumes that a husband and a wife living together share their total income equally for support purposes. Social Security Claims Manual, Sections 2625, 2628. The husband's support is computed by determining the husband's and wife's total individual income from all sources, excluding from this total any amounts not used for the support of either, and dividing the balance equally between them. If the husband's individual income is half or less than this equal division, the wife is deemed to have contributed to half his support. *Ibid.* Thus, to meet the statutory standard, a widower must have contributed no more than 25 percent of total family income at the time of his wife's death; conversely, the wife must have contributed at least 75 percent.

quarter more to make up her husband's half of the shared total).[15]

When Congress in 1950 extended benefits to husbands and widowers, it had a rational basis for limiting benefits to those members of that class who received the majority of their support from their wives. The situation of married men in the economy was almost the reverse of married women. In 1950, 86.8 percent of men were in the labor force, as against 33.9 percent of women. *Women,* Table 7–2, p. 28. Of married men living with their spouses, 91.6 percent were in the labor force as against only 23.8 percent of women. *Id.* at Table 7–4, p. 30. The median earnings of men, moreover, were as of 1960, approximately 40 percent higher than the median earnings of women who worked. *Id.* at Table 10–3, p. 48. Finally, as of 1950, 65.4 percent of men worked year round at full time jobs as against 36.8 percent of women. *Id.* at Table 9–1, p. 40.

In the period approaching the retirement years, when crucial quarters of coverage may be earned to be eligible for retirement benefits,[16] the figures were equally dramatic. In 1950, of persons between 45 and

[15] The half-support requirement made redundant the simultaneously enacted requirement that widowers who did not actually live with their wives must have been receiving support from them. Section 216(h)(3), 64 Stat. 512. This requirement was repealed in 1957 at the same time it was eliminated for widows. 71 Stat. 518. (See p. 21, *supra.*)

[16] "Broadly speaking, eligibility for benefits depends on satisfying statutory conditions as to (1) employment in covered employment or self employment (see § 210(a), 42 U.S.C. § 410(a)); (2) the requisite number of "quarters of coverage"—*i.e.*, three-month periods during which not less than a stated sum was earned—the number depending generally on age (see §§ 213–215, 42 U.S.C. §§ 413–415); and (3) attainment of the retirement age (see § 216(a), 42 U.S.C. § 416(a)), § 202(a), 42 U.S.C. § 402(a)." *Flemming* v. *Nestor*, 363 U.S. 603, 608.

54 years of age, 95.8 percent of men were in the labor force, but only 38 percent of women; between 55 and 64 years of age, the proportion was 86.9 percent of men, but only 27 percent of women. *Id.* at Table 7–2, p. 28.

These figures have striking consequences in the retirement years. In 1974, more than two out of three poor persons over 65 years old were women, and 18.3 percent were in households below the poverty line.[17] Poverty among elderly men was markedly lower—11.8 percent of the total male age group. Task Force Report, *supra,* at 37. Eight out of ten surviving men over 65 are married but 52 percent of aged women were widows (6.3 million). Of older persons living alone, five times as many are widows as are widowers. Task Force Report, *supra,* at 68–69.

Thus the probable needs of widowers as a class were dramatically different from those of widows. Because of this difference, Congress was justified in defining the class of widowers eligible for benefits more narrowly than it had drawn the class of eligible widows. Indeed, to have provided benefits to

[17] The 1974 poverty line was $2,352 for an aged individual (65–plus) and $2,958 for a two-person family headed by a person 55 or older. Task Force Report, *supra* at 37.

all widowers without regard to whether they were dependent upon their wives for support, would have been inconsistent with the legislative purpose of providing benefits to family members on the basis of probable need.

The half-support requirement for widowers thus reflected a rational distinction between needy and non-needy men who, for the most part, enjoyed in their retirement years the fruits of their active participation in the labor force over their lifetime. For the aged widow, the economy offered sparser fare. Congress therefore concluded that different treatment was warranted for each class.

3. THE DIFFERENT TREATMENT ACCORDED WIDOWS AND WIDOWERS DOES NOT DENY DUE PROCESS

When in 1939 Congress initiated a benefit program only for wives and widows, but not for husbands and widowers, its action was constitutionally permissible. As the Court recently noted in *Geduldig* v. *Aiello,* 417 U.S. 484, 495:

> This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . ." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). Particularly with respect to social welfare programs, so long as the line drawn by the State is

> rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 486–487 (1970).

As we have shown above, the women's program for aged widows established in 1939 and the men's program for aged widowers established in 1950, viewed in their own terms, are each separately rational. The question here is whether the difference between the treatment of one category of widows and widowers, reflecting a permissible treatment of each category separately, becomes invalid when the categories are compared as part of the overall aged persons' benefit program. The answer is negative.

Since the two programs have rational bases, they represent a rational constitutional classification. When the two programs are compared, the difference in treatment is justified because the probable need of aged widows as a class is different from that of aged widowers. The reasons for extending survivors benefits to non-dependent widows do not require the extension of such benefits to non-dependent widowers.

As with all statutory classifications, there are imperfections. But the Constitution does not require that statutory classifications be drawn with mathematical precision. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78–79. The Social Security Act, like other complex programs for publicly financing important

social needs, is a "'rough accommodation' of interests [drawn] in an effort to arrive at practical and workable solutions." *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 55; *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69–70.

The fact that Congress has adopted a standard that in particular cases may be over-inclusive in terms of the statutory objective—to meet probable need—does not require Congress to ignore the objective. *Dandridge* v. *Williams,* 397 U.S. 471; *Kehn* v. *Shevin, supra.* Due process, in cases involving economic and social welfare programs, interposes "a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor, supra,* 363 U.S. at 611, *Richardson* v. *Belcher,* 404 U.S. 78, 84; *Dandridge* v. *Williams,* 397 U.S. 471, 484–486.

This standard is applied because of the highly complex factors which must be balanced in arriving at "practical and workable solutions." *San Antonio School District* v. *Rodriguez, supra,* 411 U.S. at 55. In the Social Security Act, Congress had to balance considerations of individual equity—measured by the benefits each wage earner receives for the taxes he pays—against the overall social adequacy of the system, in meeting the probable needs of beneficiaries whose cash benefits may substantially exceed the taxes collected on their employment.[18] See Advisory Council

[18] Cash benefits in relation to taxes paid have been skewed in favor of lower income workers and their dependents. Compare Report of the Committee on Economic Security, H.R. Doc. No.

Report, 1975, *supra,* at 10–12; *Weinberger* v. *Wisenfeld, supra,* 420 U.S. at 647 n. 14. It was also required to identify the varied economic and social interests involved, and strike a reasonable balance between the probable needs of various groups of beneficiaries, and the equally important objective of maintaining a soundly financed system which does not impose an undue tax burden on current employees and employers. (See discussion, *infra,* pp. 38–39; see also Appellant's Brief in Opposition to Motion to Affirm, pp. 6–8.)

The legislature alone has the means for revising the social security program in the light of the changing nature of our society, including the swiftly changing role of husbands and wives as dependents or as self-supporting individuals. Under the rationale of *Flemming* v. *Nestor, supra,* 363 U.S. at 610–611, as reconfirmed in *Weinberger* v. *Salfi, supra,* 422 U.S. at 768, great deference must be granted to the distinctions Congress has drawn in classifying beneficiaries.

The district court failed to recognize and give effect to the differences which Congress had perceived between the probable needs of the classes of aged widows and widowers as a whole. Instead it assessed the statute as if the provision for widows was "over-inclusive," because the absence of a proof-of-support

110, *supra,* at 3, with the Advisory Council Report, 1975, *supra,* at 11–12; "[E]ach worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation." *Flemming* v. *Nestor, supra,* 363 U.S. at 609–610.

requirement permits some non-dependent widows to receive benefits; and as if the provision for widowers was "under-inclusive," because the proof-of-support requirement denies benefits to the non-dependent sub-class of widowers. This approach is inconsistent "with the standards of legislative reasonableness enunciated in cases like *Dandridge* v. *Williams* and *Richardson* v. *Belcher*." *Weinberger* v. *Salfi, supra*, 422 U.S. at 777.

The careful prescription in *Weinberger* v. *Salfi*, explains how claims of discriminatory classification under the Social Security Act should be assesed.

Salfi upheld the provision requiring surviving spouses to have been married for at least nine months in order to receive survivor's benefits. But its reasoning also applies to other classifications under the Social Security Act. Applying the *Salfi* test here (422 U.S. at 777), the question is not whether Congress has precisely defined the classes which caused it concern. The question is whether its concern having been reasonably aroused by the differing probable needs of aged men and aged women, and in the light of social and economic realities which created both the needs and the differences, it may rationally conclude that different classifications will advance its objective of meeting those needs; and that the expense and other difficulties of individual determinations justify the inherent imperfection of its broad classifications.

Under this standard, the half-support distinction between aged widows and aged widowers is rational, even though it produces different results for the sub-

classes of non-dependent widows and non-dependent widowers.[19]

First, comparatively few married women of retirement age were non-dependent, while the reverse is true for aged married men. Of married women now of retirement age (*i.e.*, born before 1917), considerably less than 40 percent were in the labor force for a substantial portion of their married lives, or contributed more than half their husband's support.

Despite significant gains for women in the labor force, the Bureau of the Census has reported: "In 1960, working wives contributed, on the average, about 20 percent of their families' total income; in 1974 their earnings accounted for approximately 27 percent of the total family income." *Women, supra,* p. 46; see also *id.* at Table 10–10, p. 52. In contrast, almost all married men now of retirement age worked

[19] In defining these sub-classes, both widows and widowers who are entitled on their own account to old-age insurance benefits which exceed their spouses' are excluded, since the statute denies such persons benefits. Section 202(e)(1)(D) and (f)(1)(E), 42 U.S.C. (Supp. IV) 402(e)(1)(D) and (f)(1)(E). The sub-classes, therefore, consist of non-dependent widows and widowers who either were not engaged in covered employment, or whose covered employment over their working lives entitled them to old-age benefits less than their spouses.

For coverage of the Social Security Act, see Section 210, 42 U.S.C. 410. The principal categories of excluded employees are those who, with their employers, are excused from paying social security taxes because they are contributing to the Federal Civil Service retirement system (5 U.S.C. 8301–8348), to the Railroad Retirement System (45 U.S.C. 228a–228z), and to state and local government plans not covered by the social security system agreements under Section 218, 42 U.S.C. 418. There is also a miscellany of minor exclusions.

for a substantial portion of their married lives. In 1950, 91.6 percent of married men living with their spouses were in the labor force, as against 23.8 percent of women. *Women,* Table 7–4, p. 30. With the increase in the time for education, and changes in the social role of women, these figures, as of 1975, had shifted to 83.1 percent for men and 44.4 percent for women. *Ibid.* Even today, therefore, 55.6 percent of married women are not in the labor force. See also *Frontiero* v. *Richardson,* 411 U.S. 677, 689 n. 23; *Kahn* v. *Shevin,* 416 U.S. 351, 354 n 7; *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 643 n. 11.

Viewed from the standpoint of the present retirement generation, it may reasonably be inferred that few husbands were dependent at the time of their wives' death or retirement under the half-support requirement as administered by the Secretary. Under that test the wife must contribute at least 75 percent of the joint family income (50 percent of which is for her own support and 25 percent for her husband's) in order for her husband to claim dependency. See n. 14, *supra,* p. 25. Yet, as of 1970, in only approximately 12 percent of those families where the wife worked did she contribute more than half of the total family income, and in only three percent did she contribute more than three-quarters. (Linden, *Women: A Demographic, Social and Economic Presentation,* p. 34 (1973).) Even today, the median average contribution of the wife is only 27 percent. *Women, supra,* Table 10–10, p. 52.

Furthermore, the likelihood of a wife's or widow's dependence upon her spouse, and the likelihood that she is not self-supporting, is substantially greater when, as here, she is near retirement age. The Court has recognized that for women generally "the job market is inhospitable to the woman seeking any but the lowest paid jobs." *Kahn* v. *Shevin, supra,* 416 U.S. at 353. For the elderly woman, perhaps a widow,[20] of an age qualifying her for benefits, the situtation is far worse. In 1974, 77.4 percent of men between 55 and 64 years of age participated in the labor force, but only 40.7 percent of women. After age 65, almost three times as many men as women remain in the labor force. *Women,* Table 7–2, p. 28.[21]

Furthermore, aged widowers as a class are not as needy as aged widows, both because of their work history, and the markedly lower incidence of poverty among elderly men. Task Force Report, *supra,* at 37.

A dependency test for all widows, the vast majority of whom were in fact in substantial need, would represent a burdensome requirement serving only the purpose of eliminating a small percentage of non-dependent women. Many of these almost certainly would be needy in any event. In contrast, requiring

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[20] Of all women over 65, about 52 percent (6.3 million) are widows. Task Force Report, *supra,* at 68.

[21] See also Hearings before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, on Economic Problems of Aging Women, 94th Cong., 1st Sess., 3 (1975).

widowers to prove half-support eliminates a high percentage of beneficiaries who fall outside the principal rationale of the survivor's benefits program—probable need.

B. EXTENDING SURVIVORS INSURANCE BENEFITS TO OTHERWISE ELIGIBLE NON-DEPENDENT WIDOWERS WOULD FURTHER NO RATIONAL PURPOSE

The present provision for widows benefits does not disadvantage widows, since they need not prove support in any event. It does not disadvantage those widowers who in fact were receiving more than half of their support from their wives, for they can meet the support requirement. The disadvantaged group therefore, consists of non-dependent men (*i.e.,* men who were contributing more than 25 percent of the family income), who meet the other statutory requirements for benefits. This is a relatively small proportion of aged men married to women eligible for their own social security old-age benefits, although the cost of extending survivors benefits to such non-dependent men is very high (see discussion, *infra,* pp. 38–39).

In addition to the age requirement (the widower must be 60), the primary benefits of these men from their own earnings must be less than their spouses' primary insurance amount (see n. 19, *supra,* p. 33). Section 202 (c)(1)(D) and (f)(1)(E). The half-support requirement is measured during the 12 months before the wife's death, unless untoward circumstances such as illness or unemployment pre-

vented the wife from contributing at least half of the claimant's whole support for at least three months of the support year. Social Security Claims Manual, Sections 2604 and 2605.

The number of aged married men with their own benefits who, during this final support period, were contributing more than 25 percent of family income and were therefore non-dependent, but who earned less than half of the family income during the bulk of their married lives (and so had a primary insurance amount less than their wives), is, proportionately, quite small. The Social Security Administration's Actuary estimates that out of 2.085 million aged husbands and 0.639 million aged widowers of insured women, approximately 104,000 husbands and 144,000 widowers had primary insurance amounts less than their spouses, *i.e.,* nine percent.[22] This figure closely correlates with data indicating that as of 1970, in only nine percent of families were the wife's earnings more than half but less than three-quarters of total family income. Linden, *supra,* at 34.

The other group affected are those who are non-dependent, but whose lifetime earnings were for the most part not covered by social security at all. These are principally retired public employees like the appellee, who were already receiving a government pension. See Amended Complaint, par. 9 (A. 14). Since the purpose of the statute was to meet the probable

[22] The methodology for these estimates is set forth in the Appendix to this brief, *infra,* pp. 1A–6A.

need of the class, there was no reason why those who were in public employment, or covered by other systems such as Railroad Retirement, should be given survivors' benefits. Such individuals already had a pension from employment excluded from the social security system because the employee was contributing to a separate system.

Projected to 1977, this group of aged husbands and widowers includes almost a quarter million men over 62 (247,000), which is 47.5 percent of the total of the estimated number of men (covered and not covered 520,000), who would become eligible if the half support requirement were eliminated (App., *infra*, p. 6A). No purpose would be served by giving this group double benefits.

Thus, appellee and similarly situated non-dependent spouses are not entitled to any relief which in effect enlarges the inevitable imperfections of the statutory classifications Congress adopted to meet the differing needs of aged widows and widowers. Such relief departs further from the statutory purpose by substantially increasing the class of non-dependents qualifying for secondary benefits who do not meet the standard of probable need. It creates a windfall that distorts the statutory scheme, and contributes to an irrational distribution of the payroll taxes levied upon currently productive employees and employers who finance the social security benefits of retirees, and their dependents and survivors.[23]

[23] The social security system is funded by the "current cost" method of financing: taxation of the currently employed and their employers, and immediate appropriation of those taxes by Congress to provide the fund from which benefits to deceased, retired and disabled workers and their beneficiaries will be paid. "In essence, the plan transfers money from one generation to another with the amount taken from the one generation being measured by the other generation's benefit requirements." Advisory Council Report, 1975, *supra*, at 45. Projected funding depends on actuarial prediction of benefits to be paid out under the Act's criteria. Any substantial expansion of benefits requires a concomitant adjustment in funding.

Moreover, such an extension irrationally imposes a further burden upon the already over-strained financing for the social security system. That system is presently threatened with a deficit because the current and projected cost of benefits exceeds the current and projected payroll taxes intended to finance them.[24] Elimination of the half-support requirement would add benefits for 520,000 aged husbands and widowers at a total cost in 1977 of $447 million (App., *infra*, p. 5A), including $211 million for aged widowers.[25]

As we have shown above, this substantial burden is unrelated to the purpose of the statute—to meet the differing probable social welfare needs of the current retirement generation of widows and widowers. The due process analysis outlined in *Weinberger* v. *Salfi, supra*, does not require that those differences

[24] The estimated deficit for 1974, expressed as the difference between cost, as a percent of taxable payroll required to meet benefits, and the payroll tax rate on employees and employers, was 0.77 percent. Advisory Council Report, 1975, *supra*, at 48. Today there are 30 beneficiaries for every 100 workers. *Ibid.*

[25] The cost may be as much as six times greater than this amount if the decision below is applied retroactively.

be disregarded when they have a rational basis. *Kahn* v. *Shevin, supra; Schlesinger* v. *Ballard, supra.*

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

METHODOLOGY USED IN PREPARING FIRST-YEAR COST ESTIMATES FOR A PROPOSAL TO ELIMINATE THE "ONE-HALF SUPPORT" DEPENDENCY REQUIREMENT FOR HUSBAND'S AND WIDOWER'S BENEFITS

I. COST FOR HUSBAND'S BENEFITS

A. When the estimate was made in 1974, the number of female retired workers receiving old-age insurance benefits was projected to January 1, 1975, by age groups. The total projected number for January 1, 1975, was 7,018 thousand.

B. Based on data from surveys of aged beneficiaries that were conducted by the Office of Research and Statistics, the probability that a female retired-worker beneficiary is married was computed by age groups. These probabilities were applied to the projected numbers of female retired-worker beneficiaries, by age group, to obtain an estimate of 2,438 thousand husbands of such retired workers.

C. Reports published by the Bureau of the Census contain data on the number of married couples in the U.S. population, classified by 5-year age groups of the husband crossed with 5-year age groups of the wife. (Separate data are shown for the age group 62–64 for husband and wife each.) These data were used to obtain an estimate of 2,253 thousand husbands aged

62 and over, from among the 2,438 thousand total husbands estimated in B. This number was distributed by age groups, 62–64 and 5-year age groups for 65 and over.

D. For the husbands obtained in C, the probability that the husband is himself insured for old-age insurance benefits was applied to the estimated number of husbands, by age group. This probability, for each age group, was assumed to be the same as the probability that a male in the total U.S. population, in the corresponding age group, is insured. The resulting estimate of husbands aged 62 and over who were not themselves eligible for old-age insurance benefits was 168 thousand. Since about 8 thousand husbands were receiving benefits under present law on January 1, 1975, the estimated number who would have been newly eligible for husband's benefits on January 1, 1975, if the one-half support dependency requirement had been eliminated on that date is 160 thousand.

E. From among the estimated 2,085 thousand husbands age 62 and over who were eligible for benefits on their own earnings records, it was estimated that 5 percent, or 104 thousand, could become eligible to a partial husband's benefit if the dependency requirement were eliminated. The monthly benefit payable to these husbands would be the amount by which the husband's benefit exceeds his own retired worker's benefit. The probability that the husband's benefit is higher than the male worker's benefit, estimated at 5 percent, was based upon program data for retired workers and wives in current payment status and the assumption that the distribution by amount of benefit for male workers (without wives) would be the same as the

distribution by amount of benefit for the insured husbands of female workers at each benefit level.

F. The estimated numbers of husbands who would become eligible if the dependency requirement were removed were projected to 1977. Benefit amounts, based upon average benefits for female workers, were applied to obtain the estimated amount of additional benefit payments in calendar year 1977, assumed to be the first full year. The projection and benefit payment computation are outlined below:

	Noninsured husbands (full benefit)	Insured husbands (partial benefit)	Total
Estimated number of newly eligible husbands (thousands):			
January 1, 1975	160	104	264
June 30, 1977	185	114	299
Estimated average annual amount, calendar year 1977	$1,168	$167	----
Estimated amount of additional benefit payments, calendar year 1977 (millions)	$216	$19	$235

II. COST FOR WIDOWER'S BENEFITS

A. The total number of widowers age 62 and over in the population in March 1973 was obtained, by age group, from Census Bureau reports. This number was 1,454 thousand.

B. The probability that the deceased spouse of a widower age 62 or over was insured at the time of her death was estimated, by age group, and applied to the widowers in A. The resulting total number of widowers age 62 and over of insured females was 691 thousand.

C. For the widowers obtained in B, the probability that the widower is himself insured for old-age insurance benefits was applied to the estimated numbers of widowers, by age group. This probability, for each age group, was assumed to be the same as the probability that a male in the total U.S. population, in the corresponding age group, is insured. The resulting estimate of widowers aged 62 and over who were not themselves eligible for old-age insurance benefits was 52 thousand.

D. For ages 60–61, a method essentially similar to the above yielded 3 thousand widowers, so that the total number of eligible widowers aged 60 and over was 55 thousand. Since about 3 thousand widowers were receiving benefits under present law on March 31, 1973, the estimated number who would have been newly eligible for widower's benefits on March 31, 1973 if the one-half support dependency requirement had been eliminated on that date is 52 thousand.

E. About 639 thousand widowers aged 62 and over were eligible for benefits on their own earnings records. It was estimated that about 144 thousand, or 22.5 percent of the total, could become eligible to a partial widower's benefit if the dependency requirement were eliminated. The monthly benefit payable to these widowers would be the amount by which the widower's benefit exceeds his own old-age benefit. The 22.5 percent estimate was based upon a study of a small sample of cases.

F. The estimated numbers of widowers who would become eligible if the dependency requirement were removed were projected to 1977. Benefit amounts, based upon average benefits for female workers, were applied to obtain the estimated amount of additional

benefit payments in calendar year 1977, assumed to be the first full year. The projection and benefit payment computation are outlined below:

	Noninsured widowers (full benefit)	Insured widowers (partial benefit)	Total
Estimated number of newly eligible widowers (thousands):			
March 31, 1973	52	144	196
June 30, 1977	61	159	220
Estimated average annual amount, calendar year 1977	$2,213	$478	----------
Estimated amount of additional benefit payments, calendar year 1977 (millions)	$135	$76	$211

G. An additional $1 million was estimated for disabled widowers aged 50–59.

III. TOTAL ADDITIONAL BENEFIT PAYMENTS IN CALENDAR YEAR 1977:

[In millions of dollars]

Husbands	$235
Widowers	211
Disabled widowers	1
Total	447

ESTIMATED NUMBER OF NEWLY ELIGIBLE PERSONS UNDER PROPOSAL TO ELIMINATE THE "ONE-HALF SUPPORT" DEPENDENCY REQUIREMENT FOR HUSBAND'S WIDOWER'S BENEFITS, BY GOVERNMENT PENSION CATEGORY, JUNE 30, 1977

A. The total numbers of husbands and widowers may be found in the Staff Memorandum dated May 12, 1976. An estimated 1 thousand disabled widowers

aged 50–59 were added to bring the total for June 1977 to 520 thousand.

B. The numbers of eligible husbands and widowers who are also insured and therefore eligible for old-age benefits are also shown in the Staff Memorandum.

C. Of the eligible husbands and widowers who are not insured for old-age benefits, estimates were made of the number receiving retirement benefits from other government pension plans. These very rough estimates were based on the sketchy data available on the numbers of persons receiving benefits from other government plans who were not also receiving social security benefits.

D. The estimates are summarized in the table below.

	Number (in thousands)	Proportion of total
Total husbands, widowers (including disabled widowers)	520	1.000
Eligible for social security retirement annuity under present law	273	.525
Not eligible for social security retirement annuity under present law	247	.475
Receiving a retirement annuity from:		
Railroad	54	.104
Civil service	83	.160
A State or local government plan	76	.146
None of the above	34	.065

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IN THE

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OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,

Appellant,

—v.—

LEON GOLDFARB,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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38

INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Question Presented 2

Statute Involved 3

Statement of the Case 3

Summary of Argument 6

ARGUMENT:

I. The gender-based criterion established by 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) discriminates invidiously against gainfully-employed women insured under social security as well as against their surviving spouses 12

A. The statute discriminates against gainfully-employed women insured under social security 12

B. The statute discriminates against surviving spouses of female workers insured under social security 18

II. Employment of a gender-based criterion as a means to determine benefits due on the earnings record of an individual insured under social security constitutes a denial of the equal protection of the laws guaranteed by the due process clause of the fifth amendment 19

PAGE

A. The 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) gender line favors marital units with a male insured individual over units with a female insured individual; this favoritism does not fairly and substantially advance legitimate governmental ends 23

B. The legislative presumption underlying the §402 differential, that women depend on men but not vice versa, is today further than ever from the truth and in fact never matched reality 25

C. Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women 34

D. Administrative convenience does not justify gross categorization by gender 38

E. Budgetary considerations do not justify resort to an otherwise invidious gender classification 40

III. Employment-related benefits distributed by government must be allocated with an even hand and without resort to classification based on gender per se 47

A. Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation 47

PAGE

B. Federal laws governing private and public sector employment require employers to accord spouses of female employees all fringe benefits accorded spouses of male employees; these laws reflect the overriding concern of Congress to eliminate gender-based discrimination in the economic sphere 51

IV. Consistent with the dominant congressional purpose, to provide old-age and survivors insurance in a manner that respects the dignity of the aged, the Court should declare 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) unconstitutional insofar as these provisions deny to the spouse of a female wage earner benefits accorded the spouse of a male wage earner 60

CONCLUSION 70

ADDENDUM 71

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PAGE

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Bowen v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) 16, 43, 49, 50, 64
Brennan v. *Corning Glass Works*, 417 U.S. 188 (1974) 66
Burrow v. *Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940) 64

Chastang v. *Flynn and Emrich Co.*, 365 F. Supp. 957 (D. Md. 1973) 52
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Clark v. *Celebrezze*, 230 F. Supp. 798 (D. Mass. 1974), *aff'd*, 344 F.2d 479 (1st Cir. 1965) 6, 27, 30, 34, 40
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de Castro v. *Weinberger*, 403 F. Supp. 23 (N.D. Ill. 1975) 43, 64
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PAGE

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Gruenwald v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968) 36, 37

Henslee v. *Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595 (1949) 49

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PAGE

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Legatos, Estate of, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) 64
Lewis v. *Cohen*, —— F. Supp. —— (E.D. Pa. March 5, 1976) [44 U.S.L.W. 2457] 36

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Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974) 41, 62
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PAGE

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Sosna v. *Iowa*, 419 U.S. 393 (1975) 41

PAGE

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Taylor v. *Louisiana*, 419 U.S. 522 (1975) 20, 24, 30, 35, 38, 48

United States Dep't of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 41, 42, 62, 63

Vaccarella v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973) 43, 64

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Constitutional Provisions:

United States Constitution

Fifth Amendment 2, 3, 19, 22, 61, 63

Fourteenth Amendment 3, 22, 50

PAGE

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5 U.S.C. §7154 (1970) 54

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5 U.S.C. §8902(f) (1970) 54

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PAGE

38 U.S.C. §102(b) (Supp. IV, 1974) 54
38 U.S.C. §1682 (1970) 54

42 U.S.C. §402(g) 14, 60
42 U.S.C. §405(g) (1970) 4
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42 U.S.C. §415 (1970) 39
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42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) .....*passim*

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PAGE

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PAGE

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Jurisdictional Statement, *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975) 60

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PAGE

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Motion to Affirm, *Mathews* v. *Coffin*, No. 75-791 6
Motion to Affirm, *Mathews* v. *Jablon*, No. 75-739 .....6, 40

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Note, 89 Harv. L. Rev. 95 (1975) 15, 18, 21, 24, 37, 50, 68
Note, 55 Harv. L. Rev. 1030 (1942) 65
Note, *Sex Classifications in the Social Security Benefit Structure*, 49 Ind. L.J. 181 (1973) 25, 29, 59, 68
Note, 9 U. Mich. J. L. Ref. 138 (1975) 56, 67

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PAGE

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PAGE

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IN THE

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OCTOBER TERM, 1975

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F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,

Appellant,

—v.—

LEON GOLDFARB,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

Opinion Below

The opinion of the United States District Court for the Eastern District of New York is reported at 396 F. Supp. 308 (1975).

Jurisdiction

The judgment of the United States District Court for the Eastern District of New York, declaring portions of 42 U.S.C. §402 unconstitutional on the ground that they "deprive women of protection for their families which men receive as a result of their employment," was entered June

17, 1975. Notice of appeal to this Court was filed July 15, 1975. On the Solicitor General's application, the time for docketing this appeal was twice extended by order of Mr. Justice Marshall, first to October 13, 1975, then to November 12, 1975. The Jurisdictional Statement was filed November 12, 1975, Appellee's Motion to Affirm was filed December 10, 1975, and Appellant's Brief in Opposition to Motion to Affirm was filed January 16, 1976. Probable jurisdiction was noted February 23, 1976. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1252.

The Appendix and Brief for Appellant were due April 8, 1976. On the Solicitor General's April 7, 1976 letter application, and over the opposition of counsel for appellee, the filing time was extended to May 8, 1976. By letter dated May 7, 1976, the Solicitor General requested a further extension of Appendix and Brief filing time to May 22, 1976. This request, opposed by appellee, was denied May 10, 1976. On June 2, 1976, twenty-five days after expiration of the extended period, appellee received the Appendix and Appellant's Brief. Appellant has neither sought nor received this Court's leave for filing long out of time.

Question Presented

Whether 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D), which authorize social security benefits for a spouse on a male insured individual's earnings record without regard to dependency, but condition benefits for the spouse of a female insured individual on proof of dependency, discriminate invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

Statute Involved

42 U.S.C. §402, in pertinent part, is set out in an addendum to this brief, *infra*, pp. 71-74.

Statement

This is a direct appeal from a final judgment of a three-judge district court declaring 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) unconstitutional insofar as these provisions discriminate against female individuals insured under social security and their spouses on the basis of sex. It is one of five appeals docketed in this Court by appellant, Secretary of Health, Education, and Welfare, involving substantially the same question: whether the stringent support test restricting old-age and survivors' benefits to a spouse on a female insured individual's earnings record, when no support test conditions benefits to a spouse on a male insured individual's earnings record, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.[1] The instant appeal was the first docketed. The remaining appeals, in order of docketing, are: *Mathews* v. *Silbowitz,* No. 75-712, opinion below, 397 F. Supp. 862 (S.D. Fla. 1975); *Mathews* v. *Jablon,* No. 75-739, opinion below, 399 F. Supp. 118 (D. Md. 1975); *Mathews* v. *Coffin,* No. 75-791, opinion below, 400 F.

[1] This is an equal protection-gender discrimination issue. In this context, "[the] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975).

Supp. 953 (D.D.C. 1975);[2] *Mathews* v. *Abbott,* No. 75-1643, opinion below, —— F. Supp. —— (N.D. Ohio, February 12, 1976). Each of the five district courts held the gender-explicit support test unconstitutional. Old-age (husband's insurance) benefits are at issue in *Silbowitz, Jablon* and *Abbott;* survivors' (widower's insurance) benefits are at issue in the instant case; both old-age and survivors' (husband's and widower's insurance) benefits are at issue in *Coffin.* The Secretary has indicated that if this Court affirms the decision below, he may withdraw the remaining appeals.[3]

Seventy year old Leon Goldfarb, a retired federal employee, applied for monthly social security survivors' (widower's insurance) benefits on the earnings record of his deceased wife, Hannah Goldfarb. Leon Goldfarb is not an insured individual under social security.[4] Hannah Goldfarb, a long-term public (municipal school system) employee, was covered by a municipal employees' pension (City of New York, Teachers' Retirement System) and was a fully in-

[2] In *Jablon* and *Coffin,* appeals have also been docketed by plaintiffs below. These appeals, Nos. 75-727 and 75-765, challenge the denial of demands by plaintiffs Jablon and Coffin for injunctive relief. They present the question:

> Whether 42 U.S.C. §405(g) prohibits the federal courts from enjoining the operation of a provision of the Social Security Act held to be unconstitutional.

[3] Jurisdictional Statement at 7, *Mathews* v. *Coffin,* No. 75-791.

[4] Universal social security coverage of gainfully-employed workers, including federal employees, has been identified as a vital objective. Financing the Social Security System, Hearings before the Subcommittee on Social Security, House Committee on Ways and Means, 94th Cong., 1st Sess. (May, June 1975) [hereinafter cited as 1975 House Hearings, Financing the Social Security System] 422-23 (Statement of Robert Myers, former chief actuary for the Social Security Administration); see *id.* at 150.

sured individual under social security.[5] Prior to her death in 1968, Hannah Goldfarb had contributed to social security pursuant to the Federal Insurance Contributions Act,[6] for some twenty-five years.

Leon Goldfarb's application for survivors' benefits was denied. A sole reason was supplied:

> You do not qualify for a widower's benefit because you do not meet one of the [statutory] requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she died.

Appendix at 20. To qualify under the statutory "one-half support" formula, the applicant must claim and prove that his wife supplied all her own support and at least half of his, in other words, that her income was three times his.[7]

[5] Labelling pension plan and social security "alternative system[s]" (Brief for the Appellant at 8) is misleading. Receipt of a pension, whether from private or public employment, does not disqualify a covered worker, or his or her spouse, from collection of benefits under social security. Like Hannah Goldfarb, about two-thirds of the state and local employees in the country are insured under social security. See 1975 House Hearings, Financing the Social Security System 423; cf. *id.* at 150, 422-23 (substantial numbers of career federal employees supplement their civil service retirement income by qualifying as insured individuals under social security).

[6] See 1975 House Hearings, Financing the Social Security System 629, 632 (Statement of former Secretary of Health, Education, and Welfare Wilbur J. Cohen: F.I.C.A. title designation underscores the congressional view of the social security program's essential character, it is not a welfare system or simply "another form of tax," "it provides a form of monthly life insurance").

[7] As appellant acknowledges (Brief for the Appellant at 25 n. 14), it is not enough that the wife supply more than 50 percent of the couple's income. All her own support, one-half of his, is effectively a 3:1 or 75 percent marital unit support test. See

Such proof is required only when the insured individual is female. Benefits to a spouse on a male insured individual's earnings record are not conditioned upon a support test. It is undisputed that, had the gender of these spouses been reversed, all statutory requirements for benefit entitlement would have been met.

Summary of Argument

I.

42 U.S.C. §§402(b) and (e) authorize old-age and survivors' benefits for the spouse of a male insured individual whatever the ratio of husband/wife contributions to family expenses. 42 U.S.C. §§402(c) and (f) authorize old-age and survivors' benefits for the spouse of a female insured individual only when wife's contributions to family expenses are three times as large as husband's. This differential, based on gender as such, reflects the familiar stereotype that, throughout the Nation's history, has operated to devalue women's efforts in the economic sector.

The §402 classification, coinciding "with the role-typing society has long imposed," does not fairly and substantially advance legitimate governmental ends. Were Leon Goldfarb the insured individual and Hannah Goldfarb the retired worker not covered by social security on her own

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Motion to Affirm at 4a, *Mathews* v. *Jablon*, No. 75-739, and *Mathews* v. *Coffin*, No. 75-791; cf. *id.* at 2a (female insured individual Edna Coffin and spouse Edgar Coffin were approximately equal earners, her public employees' pension was slightly larger than his). See also *Frontiero* v. *Richardson*, 411 U.S. 677, 680 n.4 (1973) (substantially identical gender line declared unconstitutional); *Clark* v. *Celebrezze*, 230 F. Supp. 798 (D. Mass. 1974), *aff'd*, 344 F.2d 479 (1st Cir. 1965) (indicating the severe impact of the §402 gender line on the most sorely pressed two-earner families).

account, both members of the family unit would qualify for social security benefits in addition to their civil service pensions. Since the insured individual in this case is female, although her contributions to social security were made on the same basis as a male worker's, the marital unit receives fewer benefits.

The statutory scheme thus favors one type of marital unit over another. In the favored unit, husband's employment attracts secondary benefits as a matter of right without regard to wife's dependency. In the disfavored unit, wife's employment generates the same benefits only if she furnishes at least three-fourths of the unit's support. This scheme, which places gainfully-employed women on a par with gainfully-employed men for social security contribution purposes, but subordinates women to men for the purpose of determining secondary benefits due under an insured individual's account, discriminates invidiously: "it provides the family of a female wage earner less protection than it provides the family of a male wage earner, even though the family needs may be identical."

II.

The familiar and once pervasive legislative assumption reflected in 42 U.S.C. §402, that women depend on men but not vice versa, never matched reality, and is today further than ever from the truth. Women have participated in vital family income production activity in substantial numbers throughout the decades in which family coverage has been a feature of social security. Increase in women's work force participation rates during these decades has been marked among women now at retirement age.

The 42 U.S.C. §402 gender classification ignores the fact of family economic interdependence and is unconcerned with the woman worker, her status, her role and interest in insuring family security. Rather, the scheme underestimates women's contributions to family support, overestimates men's, and places an official imprimatur on categorization of women as second-class workers. By rewarding men's employment more than women's, the arrangement has all the earmarks of self-fulfilling prophecy: it impedes removal of artificial barriers to recognition of women's full, human potential, and retards society's progress toward equal opportunity, free from gender-based discrimination.

III.

The 42 U.S.C. §402 discrimination against families that include a female in covered employment cannot be rationalized as part of a "compensatory" or "remedial" plan. Rather, the scheme "heaps on" an additional disadvantage, exacerbating, not alleviating, past discrimination encountered by women in the labor market. Three times in as many years this Court has been invited to label "benign" a classification that instructs the gainfully-employed female: your earnings, solely on the basis of your sex, are less valuable to your spouse and family than the earnings of a similarly positioned male. That invitation to dissemble, declined in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), warrants firm rejection in the case at bar.

IV.

As in *Frontiero,* the Government in the instant case has not and could not offer "concrete evidence" that presuming women dependent "in fact saves the Government any money." Beyond question, the 42 U.S.C. §402 3:1 dependency test, were it applied across the board, would disqualify a substantial population of women. Since many millions of married women earn enough to cover at least half their own living expenses, the one-way dependency test cannot be justified as a reasonable, economy-minded substitute for functional, sex-neutral classification.

Nor can the derivative benefits here at issue be brushed aside by labelling them a "windfall." The §402 differential underscores for the woman her subordinate status as a gainfully-employed individual. This reality is not disguised by telling her that "windfalls" are reserved for those who claim under the account of a man.

V.

Administrative or fiscal policy considerations do not justify resort to gender pigeonholing in lieu of functional description where the effect of the categorization is to denigrate the efforts of women "whose earnings contribute significantly to their families' support." Congress has on its agenda adjustments needed to alleviate immediate strains on the social security program and to tailor the system to demographic changes and projections for the decades ahead. But no participant in the legislative debate over revision of the social security system has advocated retention of gender classifications as a rational or realistic means to help hold the line, even for the shortest term. On

the contrary, proposals relevant to this issue are in notable accord: any benefit available to a male insured individual's spouse should be made available, on the very same basis, to a female insured individual's spouse.

VI.

Benefits distributed by the federal government to gainfully-employed individuals and their families must be allocated with an even hand and without resort to gross gender classification. Decisions of this Court establish that the importance of a woman's work force participation may not be discounted in employment-related regulation.

As underscored by multiple federal efforts to counter practices that deny women equal rights and opportunities in the labor market, conspicuously including appellant's own published guidelines, the 42 U.S.C. §402 gender-based differential is wedded to an old and misguided paternalistic notion at odds with national antidiscrimination policy. Congress and every concerned federal agency has identified as invidious discrimination against gainfully-employed women provision of benefits for wives or widows of male workers when the same benefits are not made available on the same terms to the husbands or widowers of female workers. These federal directives reflect that in an egalitarian union, man depends on woman fully as much as woman depends on man.

VII.

Upon determining that the gender line drawn by 42 U.S.C. §402 is unconstitutional, the Court, consistent with the dominant congressional purpose, should declare the social insurance benefits in question equally applicable to men and women. The remedial issue in this case involves

tentative adjudication, not definitive disposition by this Court. Ultimate authority to eliminate or reshape social security spousal benefits remains with Congress. Consonant with the pattern unexceptionally followed by Congress in recent years, the legislature would extend the same benefits to the spouses of male and female insured individuals "without subjecting them to the humiliation" of a dependency test.

A cross-the-board dependency test would be inconsistent with the basic design of social security as an "earned right," not a public assistance, need-determined welfare program. Moreover, extension of the support requirement would impose an administrative burden of potentially monstrous proportion. Finally, since similarly circumstanced spouses of male wage earners have been accorded the benefits in question, the denial of equal protection to appellee Goldfarb can be repaired only by according him benefits from the date of his application. Neither application of a dependency test cross-the-board nor elimination of survivors' benefits forms any part of the "case or controversy" Leon Goldfarb's complaint presents. Under the circumstances, declaration of the invalidity of the 42 U.S.C. §§402 (c)(1)(C) and (f)(1)(D) one-way, one-half support stipulation is the only appropriate judicial remedy.

ARGUMENT

I.

The gender-based criterion established by 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) discriminates invidiously against gainfully-employed women insured under social security as well as against their surviving spouses.

A. *The statute discriminates against gainfully-employed women insured under social security.*

> [T]he Constitution . . . forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men. *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645 (1975).

Under 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D), a female wage earner's social security contributions attract old-age and survivors' benefits for her spouse only if the wage earner supported herself and supplied "at least one-half" of her husband's support. By contrast, no support test restricts old-age and survivors' benefits due to a spouse under a male wage earner's account. 42 U.S.C. §§402(b), (e). This discrimination, based on gender as such, cannot be distinguished on any principled ground from the differentials declared unconstitutional in *Wiesenfeld, supra,* and *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

Like the dependency test for male but not female military spouses invalidated in Sharron and Joseph Frontiero's

case,[8] the virtually identical test in the case at bar "deprive[s] women of protection for their families which men receive as a result of their employment." *Wiesenfeld,* 420 U.S. at 645. The work-related equal benefits principle confirmed in *Frontiero* plainly applies to social insurance due under a wage earner's account. As this Court explained in *Wiesenfeld,* 420 U.S. at 646-47:

> We do not see how the fact that social security benefits are "noncontractual" can sanction differential protection for covered employees which is solely gender based . . . . [T]he statutory right to benefits *is* directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly.

Boldly underscoring the point, the Department of Health, Education, and Welfare consistently emphasizes in public pronouncements "the earned-right, earnings-related principles behind the social security program":

> Social security is *purchased insurance* for retirement, and not welfare. (Emphasis supplied.)

Statement of Hon. Caspar Weinberger, then Secretary of Health, Education, and Welfare, in 1975 House Hearings, Financing the Social Security System 436, 440, 441. See

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[8] Under the statutory schemes held to deny equal protection in *Frontiero,* Sharron Frontiero received housing, medical and dental benefits for herself, without regard to her marriage, just as Hannah Goldfarb qualified for social security coverage for herself, without regard to her marriage. Pursuant to this Court's judgment in *Frontiero,* medical and dental benefits accrued directly to Joseph, and Sharron received for herself and Joseph the married members housing allowance.

also *id.* at 627, 629, 632 (Statement of Wilbur J. Cohen, former Secretary of Health, Education, and Welfare, sharply distinguishing social security insurance contributions from general revenue taxation, and social security insurance payments from public assistance, need-determined welfare payments).[9]

Like the §402(g) mother's benefit declared applicable to fathers as well in *Wiesenfeld,* the gender line in the instant case denies the female worker protection for her spouse which a similarly situated male worker receives. As Mr. Justice Powell, writing for himself and Mr. Chief Justice Burger, clarified, *Wiesenfeld* is not properly explained as a parental "child care" case, for the "payment of benefits is not conditioned on the surviving parent's decision to remain at home." 420 U.S. at 654. Rather, the critical point made by Mr. Justice Powell with respect to Paula Wiesenfeld applies with equal force to Hannah Goldfarb:

> The statutory scheme . . . impermissibly discriminates against a female wage earner because it provides her family less protection than it provides the family of a male wage earner, even though the family needs may be identical.

[9] Throughout the Hearings, government representatives and advisers, as well as House members, identified three dominant themes in the social security program: earned right to benefits, wage-related contributions, and absence of means testing. See, *e.g., id.* at 113-14, 510, 519, 656, 678, 682, 686. The "earned-right principle" basic to the social security system has been stressed most recently by the current Secretary of Health, Education, and Welfare, F. David Mathews. See New York Times, March 7, 1976, Section 4, p. 3, col. 2.

420 U.S. at 654-55.[10] Hannah Goldfarb, like Paula Wiesenfeld, was treated on a par with men for social security contribution purposes, but as subordinate to men for the purpose of determining secondary benefits due under her account. See *Wiesenfeld,* 420 U.S. at 645.

As the court below pointedly observed, 396 F. Supp. at 309:

> Whatever may have been the ratio of contributions to family expenses of the Goldfarbs while they both worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple . . . retired and to her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men. The government has failed to justify this gender-based discrimination.

The same assessment has been made in every reasoned discussion of the §§402(c)(1)(C) and (f)(1)(D) gender line. Four federal district courts in addition to the court below have rendered final judgments holding that the differential operates invidiously against the gainfully-employed married woman. *Silbowitz* v. *Secretary of Health, Education,*

[10] Pressed to devalue the path-marking decisions in *Frontiero* and *Wiesenfeld,* appellant dismisses the Court's principal focus on the wage-earning woman as "merely rhetorical." Brief for the Appellant at 13 n. 2. This devaluation conflicts head-on with the Solicitor General's own principled declaration. See text following note 19 *infra.* For thoughtful description of the significance of the *Frontiero* and *Wiesenfeld* precedents, see Note, 89 Harv. L. Rev. 95 (1975).

and Welfare, 397 F. Supp. 862 (S.D. Fla. 1975) (husband's insurance benefits); *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118 (D. Md. 1975) (widower's insurance benefits); *Coffin* v. *Secretary of Health, Education, and Welfare*, 400 F. Supp. 953 (D.D.C. 1975) (husband's and widower's insurance benefits); *Abbott* v. *Weinberger*, —— F. Supp. —— (N.D. Ohio, February 12, 1976) (husband's insurance benefits).[11] Indeed, appellant's predecessor and the Solicitor General have acknowledged before this Court that the sex differentials involved in *Frontiero* and *Wiesenfeld* are "very closely analogous"[12] to, and reflect the same congressional assumption[13] as the differential

[11] No court confronted with the issue has upheld the gender line. Cf. *Bowen* v. *Hackett*, 361 F. Supp. 854, 861 (D.R.I. 1973) (*Reed* and *Frontiero* require rejection of a statutory presumption, drawn for social insurance purposes, that father provides the main support of minor child).

[12] Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld*.

[13] Brief for the Appellees at 8, *Frontiero* v. *Richardson*. That assumption, woman's dependence/man's independence, is in fact the basis of social security's family insurance scheme. See pp. 25-29 *infra*. The assumption has been condemned in every analysis focused on genuine needs and interests of married female workers. See, *e.g.*, 1975 Hearings, Financing the Social Security System 204 (recommendation of the Quadrennial Advisory Council on Social Security to eliminate one-half support test for husband's and widower's benefits: "for any category of women entitled to secondary benefits the corresponding category of men should be entitled to benefits on the same basis"), 399 (former chief actuary, Social Security Administration recommendation for immediate elimination of the §402 husband's and widower's benefit one-half support requirement, for if Congress does not "grab the ball . . . and run with it . . . [s]urely, the courts will at some time in the near future make this change"); 122 Cong. Rec. S5014 (daily ed. April 6, 1976) (remarks of Sen. Church, Chairman, Senate Committee on Aging); Pension Problems of Older Women, Hearings before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. 43-46, 55 (October 21, 1975); Income Security for Older Women: Path to Equality, Report by the Subcommittee on

at issue here. Rebuffed by the Court's firm response to earlier essays, appellant now deals with the disadvantage the scheme imposes on the wage-earning woman by ignoring it. See Brief for the Appellant at 36.

In sum, the overt, lump gender classification in question devalues the woman's efforts in the job market by marking her as an individual whose participation in the paid labor force is subordinate to that of the family's man.[14] Consistent with this Court's precedent from *Reed* v. *Reed*, 404 U.S. 71 (1971), through *Stanton* v. *Stanton*, 421 U.S. 7 (1975), the gender line must be regarded as an impermissible means to determine benefits due on the earnings record of an individual insured under social security.

Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. 2, 34 (December 1975); U. S. Department of Labor, Employment Standards Administration, Women's Bureau, 1975 Handbook on Women Workers, Bulletin 297 [hereinafter cited as 1975 Handbook on Women Workers] 303-307, 308 n. 7, 312; Citizens' Advisory Council on the Status of Women, Women in 1975, at 13, 121 (March 1976) ("benefits for husbands and widowers should be provided without a support test as are benefits for wives and widows"); U. S. Commission on Civil Rights, Toward Elimination of Sex-Based Differentials in the Social Security System 7-10, 39 (December 1974) ("There can be no more invidious form of sex discrimination" than the overt gender classifications remaining in the Social Security Act.).

[14] Economists have noted the adverse, unfair impact on women and "deadweight loss to society" yielded by government policy based on the notion that females are properly treated as subordinate breadwinners. Boskin, The Effects of Government Expenditures and Taxes on Female Labor, 64 Am. Economic Rev. 251, 255-56 (1974); 1975 House Hearings, Financing the Social Security System 388 (statement of Harvard economist Martin Felstein). See generally Economic Independence for Women (Chapman ed. 1976) (especially articles by Griffiths at 23 and Bell at 239).

B. *The statute discriminates against surviving spouses of female workers insured under social security.*

Solely on account of his sex, Leon Goldfarb is disqualified by statute from receiving social security benefits. Identically situated spouses, like identically situated insured wage earners, are treated differently under 42 U.S.C.§§402 (b), (c)(1)(C), (e), (f)(1)(D) solely on the basis of gender. A double-edged discrimination is inherent in the §402 classification. See *Wiesenfeld,* 420 U.S. at 651-52 (explicitly acknowledging that the sex-based classification had a negative impact on men as well as on gainfully-employed women); Note, 89 Harv. L. Rev. 95, 99 n.38 (1975). Identically situated persons are accorded different treatment by reason of a characteristic over which they have no control, and which bears no necessary relationship to their abilities, needs, or functions. No woman in appellee's situation can be denied the benefits in question; no man so situated can obtain them.[15] No female wage earner can obtain through her social security contributions the coverage for her spouse as of right and regardless of his dependency, guaranteed to the spouse of every male wage earner. Like Stephen Wiesenfeld and Joseph Frontiero, Leon Goldfarb properly invokes the equal protection principle to establish his right to even-handed treatment, to receipt of social security benefits computed, without regard to gender,[16] on the basis of the contribution record of his wage-earning spouse.

[15] See *Jablon* v. *Secretary of Health, Education, and Welfare,* 399 F. Supp. at 130. Beyond question, the §402 3:1 dependency test, were it applied across the board, would disqualify a substantial population of women. See, *e.g.*, 1975 Handbook on Women Workers 5, 115, 139 (in 1973, married women working full-time year round contributed nearly 2/5 of family income; that year, women accounted for 34% of all federal white-collar workers). See also U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Special Studies, Series P-23 No. 58: A Statistical Portrait of Women in the United States 52 (Table 10-10) (April 1976). Appellant's claim that a cross-the-board dependency test would disqualify only "a small percentage of non-dependent women" (Brief for the Appellant at 35) is contradicted by the very facts appellant presents. The 27% median contribution of the wife (including those who work part-time) to total family income (see Brief for the Appellant at 34) would disqualify her under the one-half support test. See note 7 *supra.*

II.

Employment of a gender-based criterion as a means to determine benefits due on the earnings record of an individual insured under social security constitutes a denial of the equal protection of the laws guaranteed by the due process clause of the fifth amendment.

To survive constitutional review, gender-based classifications, at a minimum, must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed, supra,* 404 U.S. at 76, quoting from *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). Post-*Reed* precedent, guided by the Court's unanimous turning-point decision, responds more elaboratively to the root cause of law-sanctioned gender lines that

[16] Appellant's heavy reliance on *Weinberger* v. *Salfi,* 422 U.S. 749 (1975) (Jurisdictional Statement 4-5, Brief for the Appellant at 6, 14, 32) is as misplaced as is his offhand dismissal of *Wiesenfeld, supra,* as failing to provide "useful instruction." Brief for the Appellant at 14. No obvious and immutable badge of identification figured in *Salfi.* Cf. *Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 10, 17). Nor does "due process/conclusive presumption" analysis, the doctrine reexamined in *Salfi,* have any bearing on the instant case, which involves "discrimination based on gender as such." See *Geduldig* v. *Aiello,* 417 U.S. 484, 496 n. 20 (1974).

impact adversely upon women who seek to pursue economic or political activity on the same basis as men. See especially *Frontiero, Wiesenfeld,* and *Stanton* v. *Stanton, supra.* It is appellee's position that the 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) one-half support test for male but not female spouses does not fairly and substantially advance legitimate governmental ends.[17] *A fortiori,* the test does not meet the heightened review standard implicit in the Court's post-*Reed* decisions.

Alert to the impossibility of justifying this gender line absent the Court's willingness to adopt "anything goes" as the appropriate test, appellant tenders a revisionist version of the current decade's precedent. Brief for the Appellant at 9-14. *Reed* is written off as a case "not based upon special considerations relating to sexual classifications." *Id.* at 11. Assuming appellant's "close study" (*id.* at 9) extended to Shepard's Citations and the Index to Legal Periodicals, he is surely acquainted with the virtually unanimous view of lower courts and commentators: "Only by importing some special suspicion of sex-related means . . . can the [*Reed*] result be made entirely persuasive." Gunther, In Search of Evolving Doctrine on a

[17] *Reed* established that a "legitimate" legislative objective does not suffice to justify resort to a gender-based criterion. See 404 U.S. at 76 (legislative objective, reducing probate court workloads, did not lack legitimacy); Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 36 (1972). In *Frontiero, supra,* and *Wiesenfeld, supra,* the legislative means, gross gender classification, not the legislative objective, provision of benefits to the family or spouse of a gainfully-employed individual, rendered the statutory arrangements infirm. See also *Taylor* v. *Louisiana,* 419 U.S. 522, at 538 (1975) (although the special sex-based exemption is impermissible, the legislature remains free to prescribe relevant qualifications for jurors and to provide reasonable exemptions).

Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972); *Wood* v. *Mills,* 528 F.2d 321, 324 (4th Cir. 1975) (*Reed* teaches that sex-based classifications require "strong justification").

Equally anomalous, and irreconcilable with a pretension to "close study," is appellant's assertion that the Court has "explicitly rejected" inclusion of sex among the suspect categories. Brief for the Appellant at 10. As even cursory review of *Stanton* v. *Stanton, supra,* reveals, that issue remains open: to date, the Court has found it "unnecessary . . . to decide whether a classification based on sex is inherently suspect." 421 U.S. at 13.[18]

Since appellant's presentation ultimately rests on this Court's readiness to treat the gross gender classification before it with the utmost indulgence (Brief for the Appel-

[18] Briefs in *Reed* and *Frontiero* discuss in detail the prime generator of gender-based classifications in the law: the notion that social roles are ordained by sex, that woman's primary occupation is (or should be) wife and mother, man's, work in the world outside the home. Brief for Appellant, *Reed* v. *Reed, supra;* Jurisdictional Statement, Brief of American Civil Liberties Union, Amicus Curiae, and Joint Reply Brief of Appellants and American Civil Liberties Union, *Frontiero* v. *Richardson, supra* (lingering attachment to the notion of woman's place in man's world has caused perpetuation of lump treatment by sex in the face of forthright recognition that such en masse categorization is fundamentally unfair where race or national origin is the birth characteristic in question). Cf. *Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 10, 17); Note, 89 Harv. L. Rev. 95 (1975).

Since the differential here at issue works an invidious discrimination of the precise kind and quality at issue in *Frontiero* and *Wiesenfeld,* the decision below can be affirmed on the authority of those precedents. The course appellant urges this Court to follow, on the other hand, would necessitate a definitive ruling that sex has no place among the suspect categories.

lant at 14-15, 30, 32),[19] it is appropriate to recall the Solicitor General's own appraisal of *Reed* and *Frontiero* some two and a half years ago:

> It is now settled that the Equal Protection Clause of the Fourteenth Amendment (like the Due Process Clause of the Fifth) does not tolerate discrimination on the basis of sex. *Reed* v. *Reed,* 404 U.S. 71; *Frontiero* v. *Richardson,* 411 U.S. 677.

Memorandum for the United States as Amicus Curiae (Robert H. Bork, Solicitor General) at 8, *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974).

[19] Overwhelming congressional approval of the equal rights amendment surely was not intended to deter dynamic judicial interpretation of the fifth and fourteenth amendments to bar law-sanctioned sex discrimination. During debate on the amendment, the principal proponent in the House, Representative Martha Griffiths, declared:

> There never was a time when decisions of the Supreme Court [under the fifth and fourteenth amendments] could not have done everything we ask today. 116 Cong. Rec. 28005 (1970).

Nonetheless, she urged her colleagues to provide a further constitutional guarantee of equality of rights and responsibilities between the sexes so that there would not be the slightest doubt that men and women stand as equals before the law. Cf. 2 J. Story, Commentaries on the Constitution of the United States §§1938, 1939 (5th ed. 1891). See also Citizens' Advisory Council on the Status of Women, A Memorandum on the Proposed Equal Rights Amendment to the United States Constitution 9-10 (1970), reprinted in Hearings on S.J. Res. 61 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. at 381-82 (1970); President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 4 (April 1970); Equal Rights for Men and Women, S. Rep. 92-689, 92d Cong., 2d Sess. 10 (1972).

A. *The 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) gender line favors marital units with a male insured individual over units with a female insured individual; this favoritism does not fairly and substantially advance legitimate governmental ends.*

Were Leon Goldfarb the municipal pensioned employee insured under social security, and Hannah Goldfarb the federal employee not covered by social security on her own account, both members of the family unit would qualify for social security benefits in addition to their civil service pensions. Since the insured individual in this case is female, although her contributions to social security were the same as a male wage earner's, the marital unit receives fewer benefits. In other words, the statutory scheme here, just as the schemes in *Frontiero*[20] and *Wiesenfeld,*[21] favors one type of marital unit over another. And the basis for distinction is that in the favored unit, husband's employment attracts the old-age or survivors' benefit. His employment generates secondary benefits as of right without regard to his wife's dependency; her employment generates those same benefits only if she outearns her husband 3:1.

The pernicious impact of distinctions so grounded has become apparent: they intrude on private decision-making in an area in which the law should maintain strict neu-

[20] In defending the *Frontiero* classification before this Court in 1972-73, the Solicitor General noted that similar distinctions are found in other federal legislation. He supplied only one example: the very social security differential at issue in the case at bar. Brief for the Appellees at 8, *Frontiero* v. *Richardson.*

[21] In 1974-75, when the exigencies of this case did not determine his course, the Solicitor General maintained that the line drawn in *Wiesenfeld* and the one in question here are "very closely analogous." Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld.*

trality.[22] For when a statute assumes gainful employment as a domain in which men come first, women second, the effect is to promote the traditional division of labor between men and women, to impede removal of artificial barriers to recognition of women's full, human potential, and to retard society's progress toward equal opportunity, free from gender-based discrimination.[23] Laws of this genre, statutes that make convenient assumptions about "the way women (or men) are," were found constitutionally infirm in *Reed, Frontiero, Wiesenfeld* and *Stanton.* See also *Taylor* v. *Louisiana, supra.* On any reasoned analysis, those precedents must control the case at bar. See Note, 89 Harv. L. Rev. 95 (1975).

[22] See *Stanton* v. *Stanton, supra*, 421 U.S. at 15 (emphasizing the "self-serving" quality of distinctions that "coincide with the role-typing society has long imposed"); Note, 89 Harv. L. Rev. 95, at 100-103 (1975) ("[L]egislative interference with an individual's choice of social roles, rather than a concern about stigma . . . should guide analysis of the stereotyping effects of gender-specific classifications.").

[23] See note 14 *supra*. The Social Security Administration has acknowledged this effect in at least two publications: Hoskins & Bixby, Social Security Administration Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 94-95 (1973); Bixby, Women and Social Security in the United States, 35 Soc. Sec. Bull. 3, 7 (1972).

As to the insidious consequences of the paternalistic assumption that women depend on men, but not vice versa, see *Vuyanich* v. *Republic Nat'l Bank*, 409 F. Supp. 1083, 1089 (N.D. Tex. 1976) (supervisor's alleged statement that employee probably did not need a job because her husband was a Caucasian "smacks of sexual as well as racial discrimination").

B. *The legislative presumption underlying the §402 differential, that women depend on men but not vice versa, is today further than ever from the truth and in fact never matched reality.*

When the Federal social security program was introduced in 1935, monthly benefits were provided for workers only, not for their families. Social Security Act of August 14, 1935, ch. 531, §202, 49 Stat. 623. In 1939, the Social Security Act was amended to provide family coverage; this coverage was expressly limited to wives, widows, children and dependent parents. Social Security Amendments of August 10, 1939, ch. 666, §§201, 202, 53 Stat. 1362-66. To avoid detailed investigations into family financial relationships, no dependency-in-fact test was imposed with respect to wife, widow or minor child. See Hoskins & Bixby, Social Security Administration Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 77 (1973); Note, 49 Ind. L. J. 181, 185 (1973).

In an effort to reshape the congressional construct, appellant asserts that in 1939, Congress presumed a married woman's "social welfare need," not her "dependency." Brief for the Appellant at 18, 22 n.11, 23, 36. Again, this is revisionist interpretation. As the legislative history reflects, and as the Social Security Administration candidly publicized: "in setting up the insurance program, [Congress] considered first the traditional family, in which the man worked to support his wife and children." Riches, Women Workers and Their Dependents Under the 1950 Amendments, 14 Soc. Sec. Bull. 9 (1951).[24]

[24] Indeed, had Congress focused on a woman's "social welfare need" rather than on her dependence upon a man, the class divorced women might have attracted first attention. Many of

Extensive amendments to the Social Security Act were made in 1950. One of the alterations[25] was viewed as establishing parity between married male and female workers. As a program analyst for the Social Security Administration explained:

> The earlier [1939] legislation made no provision for benefits to a husband or widower on a woman's wage record. . . .
>
> The 1950 amendments have resolved this inequity.

Riches, *supra*, 14 Soc. Sec. Bull. at 11. The "resolution" effected in 1950 remain force. It continued benefits for wives and widows as of right without regard to dependency, and added benefits for husbands and widowers, but

these women are needy, but very few of them are supported by their former husbands, and none of them qualify for a forced share in the former husband's estate. See Jacobson, American Marriage and Divorce 126 (1959) (in 1922, the last year the Census Bureau kept national alimony data, alimony was decreed in only 15% of a nationwide sample of decrees); Bryant, Evans & Powell, American Women in International Women's Year 41, 43 (Market Opinion Research 1975) (recent, nationally-representative survey revealed that only 14% of divorced or separated mothers had been awarded alimony or maintenance payments and less than half of those with awards received payments regularly); Citizens' Advisory Council on the Status of Women, Women in 1971, Appendix C (1972); Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 187-92 (1971) (most divorcees and separated wives are awarded no or scant alimony). Yet Congress provided no coverage at all for divorced wives until 1965. P.L. 89-97, §308, 79 Stat. 375, amending 42 U.S.C. §§402, 415 (eligibility conditioned on marriage to insured for at least 20 years and satisfaction of the one-half support test); P.L. 92-603, 86 Stat. 1335 (1972) (eliminating one-half support test).

[25] Social Security Amendments of August 28, 1950, ch. 809, §101(a), 64 Stat. 483, 485 (codified at 42 U.S.C. §§402(c), (f)).

conditioned those benefits upon satisfaction of a stringent dependency test. To qualify for benefits on a woman's wage record, a husband or widower must have received at least one-half of his *individual* support from his wife. To determine husband's or widower's eligibility, total family income available for the couple's expenses is computed; half that amount is deemed husband's *total* support; half again is deducted, yielding a qualifying husband's ceiling contribution to the unit's support. In other words, wife must have paid at least three-fourths of the total family expenses for husband to qualify under her account. See *Clark* v. *Celebrezze*, 230 F. Supp. 798 (D. Mass. 1964), *aff'd*, 344 F.2d 479 (1st Cir. 1965) (where wife contributed $3624 to the couple's expenses, and husband $1344, husband does not qualify for benefits under wife's account).[26]

Legislative materials produced at the time of the 1950 amendments do not advert to the differential created by the one-way support test. The sole reference to the test made by the Senate drafters concerned the Administrator's regulatory authority to insure appropriate treatment of "income attributable to a spouse under community property laws." S. Rep. No. 1669, 81st Cong., 2d Sess. 63 (1950). However, the congressional perspective is not obscure. As a recent comment puts it:

> Congress has consistently used the "traditional" family structure (male/breadwinner and female/depen-

[26] No credit is given for the support contributed by services in the home. See 1975 Handbook on Women Workers 174-75 (Tables 75 and 76) (For two-earner couples in the 40-54 age range, the average annual dollar value of time contributed by the working wife in household services is $3200, and by the working husband, $600. For the 55 and over population, wife's contribution remains $3200, husband's increases to $900.).

dent) as the model for the development of family benefits. Consequently, it is not surprising that many provisions directly discriminate against families which include a female in covered employment.

Randolph, Sex Discrimination in the Family Benefits Section of the Social Security Act, 8 Clearinghouse Review 535 (December 1974). Describing the legislative myopia more dramatically, (then) Congresswoman Martha Griffiths said:

> The income security programs of this nation were designed for a land of male and female stereotypes, a land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not; in other words, where all of the men supported all of the women. This view of the world never matched reality, but today it is further than ever from the truth.

Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534 (1974). Indeed, even as to children's benefits, the stereotype controlled. Initially, a mother's work provided benefits for her child only if mother was the child's sole supporter *and* father was not living with the child. Social Security Amendments of August 10, 1939, ch. 666, §202(c), 53 Stat. 1364. Partial alteration was effected in 1950. Social Security Amendments of August 28, 1950, ch. 809, §101(a), 64 Stat. 484. However, full equalization of benefits available to the children of working women was not accomplished until 1967. Social Security Amendments of January 2, 1968, P.L. No. 90-248, §151, 81 Stat. 860, amending 42 U.S.C. §402(d).

In short, if any "factual basis" informed the congressional judgment in 1950, it is nowhere revealed in the legislative history of that year's social security amendments. Nor could it be. For the arrogant legislative presumption that women depend on men, but not vice versa[27] is today "further than ever from the truth," and in fact "never matched reality." Women's work force participation continues to increase, but women have participated in the labor market in substantial numbers, constituting over 25% of all workers, throughout the period in question. See 1975 Handbook on Women Workers 11. Further, the facts as to participation rates by age contradict appellant's speculation (Brief in Opposition at 4 n.3) regarding the character of "the present generation of retirement-age women." For the sharp jump in work force participation rates between 1940 and 1960 occurred among women 45 to 54, the very women now at retirement age. See 1975 Handbook on Women Workers 12.

In stark contrast to the familiar assumption, the dual-earner family represents and is destined to remain "the typical American pattern." Bell, Working Wives and Family Income, in Economic Independence for Women

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[27] Among ramifications of this facile presumption are the credit problems faced by women to which Congress has recently responded. See Equal Credit Opportunity Act of 1975, P.L. 93-495, 88 Stat. 1521, as amended by P.L. 94-239, 94th Cong., H.R. 6516 (March 23, 1976); Chapman, Sex Discrimination in Credit: The Backlash of Economic Dependency, in Economic Independence for Women 263 (Chapman ed. 1976).

Here too, it bears emphasis that the "social welfare need" label to cover Congress' independent male/dependent female assumption is appellant's very recent invention. Compare Brief for the Appellant at 24, 28, with Brief for the Appellees at 8-10 *Frontiero* v. *Richardson*, *supra* (the classification "obviously reflects the congressional judgment that most wives are dependent on their husbands"), and Note, 49 Ind. L.J. 181, 185-86 (1973).

239, 254, 258 (Chapman ed. 1976). By 1973, in more than half the nation's husband-wife families, the wife had earnings. 1975 Handbook on Women Workers 53-54, 138. Over 42% of gainfully-employed married women living with their husbands worked year round at full-time jobs. *Id.* at 53-54. These women supplied approximately two-fifths of family income. *Id.* at 5, 139. Moreover, the median proportion of family income contributed by working wives in 1970, including wives who worked part-time, was 27%. This overall relative contribution of working wives to family income, 27%,[28] was about the same in 1970 as it had been for at least a decade. U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 8 (April 1972). The 27% contribution, let alone the full-time working wife's 39% contribution, would exclude a determination of dependency-in-fact under the §402 self-support test. See *Clark* v. *Celebrezze, supra;* cf. *Frontiero, supra,* 411 U.S. at 689.

In *Taylor* v. *Louisiana, supra,* 419 U.S. at 535 n.17, this Court noted that by "October 1974, 54.2% of all women between 18 and 64 years of age were in the labor force." The situation acknowledged by the Court in *Taylor* is the result of steady growth, not precipitous change. If the notion that it is natural for man to be breadwinner, women to be dependent, had been less deeply ingrained, Congress might have noticed in 1939 and in 1950 that gainfully-employed women constituted a significant part of the work force. The reality concerning the employment of women 16 years of age and over, as presented for the relevant

[28] If support contributed by services in the home counted in the computation, the working wife's percentage would be considerably higher. See note 26 *supra.*

period in 1975 Handbook on Women Workers 11 (Table 2),[29] is set out below:

WOMEN IN THE LABOR FORCE, SELECTED YEARS, 1940-74
(Women 16 years of age and over)

Date	Number (in thousands)	As percent of all workers	As percent of woman population
Highlights*			
April 1974	35,165	39.3	45.0
April 1970	31,293	38.1	43.2
Midsixties (April 1965)	25,831	35.0	38.8
Start of the sixties (April 1960)	22,985	33.3	37.4
Midfifties (April 1955)	19,987	31.2	34.8
Korean War (April 1953)	19,116	30.6	34.0
Pre-Korean War (April 1950)	17,882	29.1	33.0
Post-World War II (April 1947)	16,150	27.6	30.9
World War II (April 1945)	19,290	36.1	38.1
Pre-World War II (March 1940)	13,783	25.4	28.9

* Civilian labor force.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Employment and Earnings, May 1960, 1965, 1970, and 1974. U.S. Department of Commerce, Bureau of the Census: Annual Report on the Labor Force, 1940-55. Social Science Research Council: "Labor Force in the United States, 1890-1960."

[29] Since the table includes females in the 16-18 age range, many of whom attend school full-time, as well as retirement-age women, the percentages are considerably lower than they would be if those under 18 and over 64 were excluded from the count.

Appellant apparently concedes the substance of women's current participation in the labor force, but hypothesizes that today's retirement-age women fit the stereotype: their men were breadwinners; they are wives and widows. See Brief in Opposition at 4. In fact, the working lives of Hannah Goldfarb, Shirley Silbowitz, Edna Coffin, Bette Jablon and Mildred Abbott[30] indicate a pattern documented for their generation, "the present generation of retirement-age women":

> In the 1940's the [labor force participation] rates for women 35 and over (excluding those 60 and over) began climbing sharply and steadily as ever-growing proportions of mothers of school-age children took jobs. By 1950, although the young, mostly single, women still had the highest rates, the rates for women 35 and older had moved much closer. Many of these women either continued to work after World War II or returned later. By 1960 the rate for women 45 to 54 (50 per cent) had risen to such an extent that it was noticeably higher than the proportion for 20- to 24-year-old women (45 per cent), and the proportion among women 35 to 44 (44 per cent) was only slightly below that of the women in their early twenties.

1975 Handbook on Women Workers 12, tabulating the facts as follow (Table 3):

[30] See text at note 11 *supra*.

LABOR FORCE PARTICIPATION RATES OF WOMEN, BY AGE, SELECTED YEARS, 1940-74*

Age	1974	1960	1950	1940
35 to 44 years	54.6	44.3	(38.2)**	(29.4)
45 to 54 years	54.9	49.5	(37.1)	(24.5)
55 to 64 years	41.7	(37.4)	(27.6)	(18.0)

* Data are for civilian noninstitutional population in March 1940 and in April of other years.

** Parentheses indicate women now at or past retirement age.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Employment and Earnings, May 1974 and Special Labor Force Report No. 14; U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-57, No. 94 and P-50, Nos. 22 and 32.

See also 1975 Manpower Report of the President, Table 1 at 57, Labor Force Participation Rates of Women, by Age Group, Selected Years 1950 to 1973 and Projected 1980 and 1990; U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 21 (November 1975) (reporting that in 1974, 54% of women 55-59 were gainfully employed, 75.4% of them at full-time jobs).

In sum, the §402 differential is characteristic of laws unconcerned with women workers, their status and security, and the reality of family economic interdependence. It indicates the legislators' traditional idea about the unimportance of women's earnings and the significance of men's. The differential diminishes the value of women's contributions to family income and impacts with particular severity on two-earner couples at low income levels. Approximately one out of four families with incomes below $5,000 relies on the wife's earnings for at least half of the total family

income. See U. S. Department of Labor, Bureau of Labor Statistics, Special Labor Force Report 130, Marital and Family Characteristics of Workers, Table U, p. A-24 (March 1970) (based on 1969 family income figures), discussed in Bell, *supra*, Economic Independence for Women at 240-43. In these families, the unit is surely "dependent" on income produced by the wife. Yet her 50-74.9% contribution to the unit's support through employment covered under the Federal Insurance Contributions Act secures no old-age or survivors' benefits for her spouse. See *Clark* v. *Celebrezze, supra.*

No legitimate government interest is served by a social insurance scheme that favors and rewards men's employment more than women's. Statutory gender lines so drawn underestimate women's contributions to family support,[31] overestimate men's, and place an official imprimatur on categorization of women as second-class workers.

C. *Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women.*

In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), and *Kahn* v. *Shevin*, 416 U.S. 351 (1974), this Court upheld gender lines regarded as operating solely to compensate women for past and present economic disadvantages. *Ballard* and *Kahn* were perceived as cases in which some women were helped, and no women were harmed by the classification in question.[32] By contrast, even on the dubious assumption

[31] Cf. note 26 *supra.*

[32] Further, the *Kahn* decision is specifically and narrowly tied to the "large leeway" traditionally accorded states with respect to their system of taxation. 416 U.S. at 355. Cf. *Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Labine* v. *Vincent*, 401 U.S. 532 (1971) (indicating similar deference to local concerns). And the discrimination §402 "works against the female breadwinner readily distinguishes this case from *Norton* v. *Weinberger*, 390 F. Supp. 1084 (D. Md. 1975) [*aff'd*, —— U.S. —— (June 29, 1976)]." *Jablon* v. *Secretary of Health, Education, and Welfare, supra*, 399 F. Supp. at 130 n. 19.

Ballard presented the tangled problem of a military career system fraught with discrimination against women, no challenge to that discrimination, but only a 20-year retirement-motivated claim by a "mustang" (enlistee-turned-officer) with an idiosyncratic case. See Davidson, Ginsburg & Kay, Sex-Based Discrimination, 1975 Supplement at 14 (West Pub. Co.). Nor did *Ballard* involve a consideration present here: legislative reluctance to "count" a female worker as fully as a male worker may reflect the unstated fear that a full count for women workers would erode male prerogatives.

that Congress intended the §402 differential to help women as individuals (rather than as appendages of men), the gender line *sub judice* plainly operates to "heap on" women wage earners additional economic disadvantages. See *Frontiero* v. *Richardson, supra*, 411 U.S. at 689 n.22; *Jablon* v. *Secretary of Health, Education, and Welfare, supra*, 399 F. Supp. at 128-30.

In assessing classifications based on "gender as such,"[33] this Court no longer accepts at face value "recitation of a benign, compensatory purpose" for legislation that ranks women as men's dependents. *Wiesenfeld, supra*, 420 U.S. at 648; see *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Stanton* v. *Stanton*, 421 U.S. 7 (1975). The case at bar presents a textbook example of the insidious discrimination characteristic of laws that treat men as the breadwinners that count, women as men's subordinates. Far from alleviating discrimination in the economic sphere, the §402 3:1 marital unit support test reflects attitudes and perpetuates prac-

[33] *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974).

tices responsible for that discrimination. See generally Chafe, Looking Backward in Order to Look Forward: Women, Work and Social Values in America, in American Assembly, Women and the American Economy 6 (Kreps ed. 1976). Significantly, when Congress genuinely determined to remedy economic discrimination against women, and focused directly on "firmly entrenched practices" inhospitable to women's claims to equal opportunity and equal remuneration in the job market (cf. 416 U.S. at 353), it flatly rejected the stereotype that underlies §§402(e)(1)(C) and (f)(1)(D). Consistent with the equal protection principle, Congress declared the female worker, her spouse and family entitled to the same benefits as the male worker, his spouse and family. Support tests for the woman's spouse were eliminated, along with all other gender-based differences in benefit terms and conditions. See, *e.g.*, 5 U.S.C. §7152 and kindred measures cited at pp. 51-58 *infra*.

Nor does *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968),[34] shield from close review the invidious distinction drawn in §402. *Gruenwald* involved a differential specifically tied to past discrimination *female wage earners* experienced in the labor market: depressed wages and early retirement policies applied by employers to women but not to men. Without the more favorable calculation formula, a formula applied to amounts in fact earned by women, past wage and job placement discrimination would have been aggravated by projection into

[34] Followed in *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa. 1974), *judgment vacated*, 422 U.S. 1050 (1975); *Polelle* v. *Secretary of Health, Education, and Welfare*, 386 F. Supp. 443 (E.D. Ill. 1974); and *Lewis* v. *Cohen*, —— F. Supp. —— (E.D. Pa. March 5, 1976) [44 U.S.L.W. 2457].

the working woman's retirement years. Thus the *Gruenwald* differential operated to alleviate past discrimination against wage-earning women without disadvantaging any member of that class." By contrast, a law denying to a female wage earner's spouse or family benefits available to a male wage earner's spouse or family cannot be rationalized by reference to wages paid to gainfully-employed women and does nothing to rectify past wage discrimination against them. Instead, congressional attention to the wives of insured wage earners is expressed in a scheme that impacts adversely on wives who are insured wage earners themselves. Far from assisting women toward equal status in economic endeavor, the classification fortifies the assumption, harmful to women, that labor for pay with attendant benefits is primarily the prerogative of men. See Matthews, Women Should Have Equal Rights With Men, 12 A.B.A.J. 117 (1926); Note, 89 Harv. L. Rev. 95 (1975).

In providing secondary benefits under a male wage earner's account as of right without regard to the dependency of his spouse, while imposing a 3:1 marital unit support test for secondary benefits under a female wage earner's account, Congress may well have been guided by the notion that "men are more likely than women to be the primary suporters of their spouses," a notion "not entirely without empirical support." But as the Court explained in *Wiesenfeld*, *supra*, 420 U.S. at 645:

[35] See *Kohr* v. *Weinberger*, *supra*, 378 F. Supp. at 1302 n.5. Congress evidently regarded the *Gruenwald* differential as a transition measure. In 1972, it extended to men the more favorable calculation formerly reserved to women. Act of October 30, 1972, §104, P.L. 92-603, 86 Stat. 1340.

> [S]uch a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

In sum, three times in as many years, this Court has been invited by the Government to shield as "benign" a classification that instructs the gainfully-employed female: your earnings, solely on the basis of your sex, are less valuable to your spouse and family than the earnings of a similarly situated male. The Court declined that invitation to dissemble in *Frontiero* and *Wiesenfeld*. On this third occasion, it is time to strike the batter out.

D. *Administrative convenience does not justify gross categorization by gender.*

In *Frontiero, supra,* 411 U.S. at 689-90, this Court laid to rest the notion that "administrative convenience" could serve as a cover for legislative resort to sex stereotyping as a basis for line drawing. See also *Taylor* v. *Louisiana,* 419 U.S. 522 (1975) (discarding administratively convenient assumption that woman's central place is at home); *Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 17). Here, as in *Frontiero,* the Government "offers no concrete evidence" that presuming women dependent "in fact saves the Government any money." 411 U.S. at 689. For it is beyond debate that many millions of married women earn enough to cover at least half of their own living expenses. See p. 30 *supra;* Brief for the Appellant at 34 (the median average contribution of the wife to total family income exceeds the 25% limit required for qualification under the one-half support test). Thus a dependency test applicable to men but not to women cannot be justified as a reasonable, economy-minded substitute for sex-neutral, functional classification.[36]

Nor does characterization of Leon Goldfarb's complaint as a claim for "a windfall" (Brief for the Appellant at 8, 38) avoid collision with constitutional principle.[37] Male wage earners' accounts attract benefits for non-dependent wives. Similarly situated female wage earners deserve no

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[36] Women's receipt of approximately 54% of social security payments, hardly evidence of discrimination against male workers, barely corresponds to women's representation in the nation's population. Women 65 and over are 12.1% of the female population; men 65 and over are only 8.8% of the male population. See U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Special Studies, Series P-23 No. 58: A Statistical Portrait of Women in the United States 1, 2, 5 (Table 1-2), 7 (April 1976). Of course, a man who enjoys long life would receive benefits based on his individual situation and would not be denied benefits on the basis of a gross gender classification. Similarly, as low paid workers, in common with men whose earnings are low, many women are aided by the weighted formula for benefit payments, *i.e.*, the highest percentage of benefits is paid for the first $110 of monthly earnings. 42 U.S.C. §415. This formula benefits *individuals* with low incomes, many of whom are women, but it does not discriminate against men.

[37] The "windfall" argument pressed by the Government in *Frontiero* with respect to veterans' benefits recipient Joseph Frontiero, Brief for the Appellees at 8-10, was firmly rejected by this Court. See 411 U.S. at 689. Impelled by the 8-1 *Frontiero* judgment, and enlightened by directives of his own and other federal departments, appellant has acknowledged that a dependency test for fringe benefits, identical to the one in the case at bar, would be illegal. The gross gender classification would render the test invalid. See pp. 56-60 *infra.* Moreover, a more subtle, facially-neutral device should fare no better. As the Equal Employment Opportunity Commission has publicized, benefits accorded an employee's spouse, when tied to proof of dependency, "discriminatorily affect the rights of women employees." See 29 C.F.R. §1604.9.

less protection for their spouses. See *Jablon* v. *Secretary of Health, Education, and Welfare, supra,* 399 F. Supp. at 130.[38] Denial of benefits under a female wage earner's account, but automatic provision of them under a male wage earner's account, underscores for the woman her second-class status as a gainfully-employed individual. This reality is not disguised by telling her that "windfalls" are reserved for those who claim under the account of a man."[39]

E. *Budgetary considerations do not justify resort to an otherwise invidious gender classification.*

In *Frontiero* and *Wiesenfeld* this Court declared invidiously discriminatory congressional action that cast the weight of the law on the side of "the role-typing society has long imposed." *Stanton* v. *Stanton, supra,* 421 U.S. at 15. The military fringe benefits arrangement in *Frontiero* and the mother's benefit in *Wiesenfeld* reflected twin congressional judgments: (1) traditional family relationships, anchoring wife to the home, should be favored and encouraged; (2) incentives, favors and encouragement available to the married man as income earner need not be accorded the married woman as income earner. These paired

[38] Cf. Motion to Affirm at 2a, 4a, *Mathews* v. *Jablon*, No. 75-739, and *Mathews* v. *Coffin*, No. 75-791 (female insured individual Edna Coffin and spouse Edgar Coffin were approximately equal earners, her public employees' pension benefits were slightly higher than his).

[39] Cf. Van Alstyne, The Demise of the Rights-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1454-57 (1968). With respect to low-income earners, see *Clark* v. *Celebrezze, supra,* and pp. 33-34 *supra*, the "windfall" characterization is particularly dubious. Moreover, to the extent that the current structure of social security provides a "windfall" for federal employees, the source of the "windfall" is wholly unrelated to husband's and widower's benefits. See 1975 House Hearings, Financing the Social Security System 150, 422-23, 539.

judgments, signalled by resort to gender rather than functional classification, were assessed as "invidious." They retain that character here,[40] for surely the Court's precedent makes it clear that neither administrative convenience nor fiscal policy considerations can justify invidious gender discrimination. Cf. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973); *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Schlesinger* v. *Ballard,* 419 U.S. 498, 503 (1975) ("administrative or fiscal policy considerations" insufficient reason for gender line); *Sosna* v. *Iowa,* 419 U.S. 393, 406 (1975) (budgetary or record-keeping considerations or administrative convenience insufficient to justify durational residency requirement).

In *Shapiro* v. *Thompson, supra,* the Court confronted a determination by Congress and at least 40 states that public money should not be spent on welfare aid to new residents. Appellant's brief in that case cited the legislative history of the one-year residence requirement, and identified as the principal reason for the requirement the legislature's desire to limit welfare costs. Brief for Appellant at 8-10, *Shapiro* v. *Thompson, supra.* This Court's determination: the Constitution requires payment of benefits to the class deliberately excluded by the legislature. Accord, *Memorial Hospital* v. *Maricopa County, supra.* Significantly, although

[40] See Testimony of Harvard economist Martin Feldstein, 1975 House Hearings, Financing the Social Security System 388 ("[T]he imposition of taxes without corresponding benefits reduces the incentive of wives to work and thus diminishes their labor force participation and their average hours of work. As the social security tax grows, this unfair treatment becomes a problem of increasing importance.").

the Court in *Shapiro* closely scrutinized the classification, it indicated that the one-year residence requirement was vulnerable even under the traditional, more lenient "rational basis" standard of equal protection review. 394 U.S. at 638.

In *Graham* v. *Richardson, supra,* state legislative determinations excluding aliens from public assistance programs were overturned by the Court; public funding had to be enlarged, despite the contrary command of the state legislature, to encompass persons entitled to equal protection under the nation's highest law.

In *New Jersey Welfare Rights Organization* v. *Cahill, supra,* this Court struck down the "ceremonial marriage" limitation in New Jersey's program for assistance to families of the working poor, thereby substantially enlarging the beneficiary class and the toll on the state fisc. It bears emphasis that the case at bar, unlike *New Jersey Welfare Rights Organization,* presents no question of federal deference due state policies on issues of local concern. And, plainly, leeway for legislative line drawing in the contributory Federal social security program is no broader than leeway for wholly state financed and operated public assistance programs. Further, no "fundamental right" or "suspect" criterion was identified by this Court in *New Jersey Welfare Rights Organization* when it summarily reversed the decision below (349 F. Supp. 491 (1972)) and, per curiam, declared the "ceremonial marriage" limitation on aid to the working poor impermissible. Accord, *United States Dep't of Agriculture* v. *Moreno, supra* (limiting food stamp program to households

in which members are related to one another violates equal protection); *Vlandis* v. *Kline,* 412 U.S. 441 (1973) (in-state tuition); *Demiragh* v. *DeVos,* 476 F.2d 403 (2d Cir. 1973) (welfare benefits); *de Castro* v. *Weinberger,* 403 F. Supp. 23 (N.D. Ill. 1975) (divorced wife's child-in-care social security benefit); *Vaccarella* v. *Fusari,* 365 F. Supp. 1164 (D. Conn. 1973) (augmented unemployment benefits for child in worker's care); *Bowen* v. *Hackett,* 361 F. Supp. 854 (D.R.I. 1973) (state unemployment and disability insurance benefits); *Chatman* v. *Barnes,* 357 F. Supp. 9 (N.D. Okla. 1973) (state social insurance disability benefits); *Miller* v. *Laird,* 349 F. Supp. 1034 (D.D.C. 1972) (medical care for service members' children born out of wedlock) (all decisions, like *Frontiero* and *Wiesenfeld,* identifying unconstitutional exclusions from government benefits without labelling the right asserted "fundamental" or the legislative criterion "suspect").

Moreover, the cost of eliminating the one-way dependency test will be comparatively low at the outset[41] and should diminish increasingly with the passage of time as we progress toward the recognized goal of universal social se-

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[41] Women and Social Security, a Working Paper prepared by the Task Force on Women and Social Security for use of the Special Committee on Aging, United States Senate, Committee Print, 94th Cong., 1st Sess. 20 (1975); Testimony of former Commissioner of Social Security Robert M. Ball, Hearings on the Economic Problems of Women, Before the Joint Economic Committee, United States Congress, Part Two, July 24-30, 1973, at 314 (without taking into account offsetting savings effected by women's constantly increasing labor force participation rates, or the impact of further shrinkage of the noncovered wage earner class, cost of removing dependency requirements for husbands and widowers would be met by increase in contribution rate of about 0.05% on employers and 0.05% on employees).

curity coverage of wage earners.[42] Shrinkage of the noncovered wage earner class has been the consistent pattern.[43]

In 1935, when the Old Age and Survivors Insurance program was inaugurated, approximately 50% of Americans gainfully employed were covered; today, over 90% are covered by the legislation. Compare S. Rep. No. 628, 74th Cong., 1st Sess. (1935), with Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. 107 (1972). Exclusions still remaining are few, and even fewer may be expected to persist, for coverage of all gainfully-employed individuals remains a primary objective.

Principal noncovered groups are career employees of the railroads and most employees of the federal government. State and local government employees constitute the only other noncovered group of any magnitude. But today, about two-thirds of state and local government employees are insured individuals under social security. 1975 House Hearings, Financing the Social Security System 423. Inclusion of railroad workers[44] and federal employees[45] continues to be urged as a rational measure toward which movement should be "rapid."

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[42] See 1975 House Hearings, Financing the Social Security System 150, 362, 422-23.

[43] For earlier statement of the universal coverage goal, see Recommendations for Social Security Legislation, Report of the Advisory Council on Social Security to the Senate Finance Committee, S. Doc. No. 208, 80th Cong., 2d Sess. 6 (1949).

[44] Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. (1972).

[45] 1975 House Hearings, Financing the Social Security System 150, 422-23.

Further, the overall cost of benefits to spouses is inaccurately projected by appellant's one-eyed estimate.[46] Offsetting coverage for the female wage earner's spouse is the constantly increasing extent to which wives and widows earn benefits under their own accounts. See 1975 House Hearings, Financing the Social Security System 80, 317-18 (female labor force participation rates predicted to increase faster then previously projected; currently, 1.9 million wives of retired workers, 42% of all such wives now on the rolls, receive primary benefits based on their own earnings); cf. Hearings on H.R. 6635, Social Security Amendments of 1939, before the House Committee on Ways and Means, 76th Cong., 1st Sess. 59 (1939).

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[46] In *Wiesenfeld*, *supra*, appellant's estimate for eliminating explicit gender lines in the Social Security Act, presented in an affidavit submitted to the district court, was some "$300 million" ($125 million for the widower's benefit here in question). Brief for the Appellant at 22 and Appendix at 15, *Weinberger* v. *Wiesenfeld*. This time round, appellant has not felt constrained by his presentation in the court below. In lieu of reference to material in the record, appellant tenders in his brief to this Court new and escalated figures (both as to the number of persons affected and the dollar amount), and a "methodology" appendix. Brief for the Appellant at 37. It is surely questionable whether this High Court is the proper forum for initial introduction of appellant's "methodology" (Brief for the Appellant at 1A-6A) and augmented figures (Brief for the Appellant at 39), concededly based in substantial part on "a small sample of cases" (4A), "sketchy data," and "very rough" estimates (6A). Further, appellant makes no attempt to place his escalated figure in context. The $447 million now claimed as the total initial year cost for covering husbands, widowers and disabled widowers, is about two-thirds of 1% (0.67%) of annual social security receipts. See 1976 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds at 2 (income of the old-age, survivors and disability insurance system during fiscal year 1975 amounted to 66.7 billion, outgo totaled 64.7 billion, yielding a 2 billion increase in the trust funds, bringing the funds' balance to a level of 48.1 billion on June 30, 1975).

Beyond question, strains on the social security program are a matter of grave concern. But those strains are unrelated to the gender pigeonholing here at issue. They are caused by current and projected demographic shifts in the nation's population—later entrance of young people into the work force, increased longevity and lower birth rates. These shifts mean (1) fewer working years and longer retirements for individuals insured under social security, and (2) a steady decline in the ratio of workers paying Federal Insurance Contributions Act taxes to social security beneficiaries. 1975 House Hearings, Financing the Social Security System 5, 7, 11, 25, 26, 66, 392, 436, 441, 600, 654, 658, 670. Senior citizens constitute a sizeable and steadily increasing portion of the nation's population. In 1930 the United States population included 9.7 people age 65 and over for every 100 people of working age (20-64 years); by 1973, the figures had changed to 18.6 people 65 and over for every 100 of working age. 1975 House Hearings, Financing the Social Security System 600. This change will undoubtedly require corresponding alteration in the nation's old-age and survivors insurance program.

Congress has on its agenda adjustments needed to alleviate immediate strains[47] and to tailor the social security system to demographic projections for the decades ahead.[48]

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[47] High unemployment is a principal contributor to immediate strains. The Social Security Administration has reported that reduction of unemployment to 5% would result in a $44.2 billion addition to the social security trust funds between fiscal year 1975 and 1981 rather than any depletion. 122 Cong. Rec. H1666 (daily ed. March 4, 1976).

[48] Social Security Commissioner James B. Cardwell has emphasized the absence of urgency in revising social security. He reported to Congress, the system "has a contingency reserve that is clearly adequate for short term and sudden change." 1975 House Hearings, Financing the Social Security System 5, 7, 9, 11.

But no participant in the debate over revision or restructure of the social security system has advocated retention of gender classifications as a rational or realistic means to help hold the line, even for the shortest term. Far from viewing the "imperfection" of the current arrangement as "inevitable" (Brief for the Appellant at 38), and in stark contrast to appellant's charge that the court below "enlarged" the imperfection, legislative recommendations relevant to this issue are in notable accord: any benefit available to a male insured individual's spouse should be made available, on the same basis, to a female insured individual's spouse. See note 13 *supra* and note 65 *infra*.

In sum, overt gender classifications remaining in the Social Security Act are invidious. Rational fiscal policy considerations provide no prop for them.

III.

Employment-related benefits distributed by government must be allocated with an even hand and without resort to classification based on gender per se.

A. *Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation.*

In *Frontiero* v. *Richardson, supra*, this Court held that gender-based discrimination in the allocation of fringe benefits to married members of the uniformed services violated the Constitution's guarantee of equal protection. The *Frontiero* judgment struck down a support test for male spouses almost identical to the one imposed by 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D). Two years later, in *Wein-*

berger v. *Wiesenfeld, supra,* the Court declared surviving family units composed of widower and child entitled to the same social security benefits as those provided by statute for units composed of widow and child. *Wiesenfeld* and *Frontiero* concerned, as this case does, woman's status and associated benefits when she participates in economic activity outside the home. As a worker, she has been assigned an inferior place, often with the aid of laws purportedly intended for her protection. As Justice Brennan commented in *Frontiero* (411 U.S. at 684):

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.

See also *Stanton* v. *Stanton, supra,* 421 U.S. at 15; *Taylor* v. *Louisiana, supra; Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 10, 17).

Spurred by a revived feminist movement[49] that has directed principal attention to employment-related inequities, legislatures and courts are responding with increased sensitivity to generators of a separate and unequal place for women in the labor force. As a perceptive male jurist observed:

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

[49] See generally Chafe, The American Woman (1972); Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971); Chafe, Looking Backward in Order to Look Forward: Women, Work and Social Values in America, in American Assembly, Women and the American Economy 6 (Kreps ed. 1976).

Green v. *Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973).[50] To assure meaningful equal protection of the laws to women, courts have begun to undertake careful analysis of gender-based legislature classifications, particularly gender lines drawn in an employment-related setting. See, *e.g., Wood* v. *Mills,* 528 F.2d 321 (4th Cir. 1975) (gender-based wage differential for male and female jailers violates equal protection); *White* v. *Fleming,* 522 F.2d 730 (7th Cir. 1975) (ordinance may not place special restrictions on female tavern employees); *Andrews* v. *Drew Municipal Separate School District,* 507 F.2d 611 (5th Cir.), *cert. dismissed as improvidently granted,* 44 U.S.L.W. 4627 (May 3, 1976) (school board's refusal to employ mothers of children born out of wedlock held unconstitutional); *Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973) (equal protection requires that young women be permitted to serve as pages in South Carolina Senate under the same terms and conditions as young men); *Bowen* v. *Hackett,* 361 F. Supp. 854 (D.R.I. 1973) (dependent child allowance must be furnished disabled and unemployed men and women on the same basis); *Stevenson* v. *Castles,* Civ. No. 7452 (D.C.Z. November 15, 1974) (free tuition limited to children of "head of household" or "principal breadwinner" employees of the Canal Zone Government and Panama Canal Company "discriminat[es] against women in violation of the equality guaranteed to them under the decisions of the Supreme Court [citing *Frontiero*] and [Title VII of] the Civil Rights Act [of 1964]"). See also *Page* v. *Welfare Comm'n,* Connecticut Law Journal, February 24, 1976, p. 3

[50] Cf. *Henslee* v. *Union Planters Nat'l Bank & Trust Co.,* 335 U.S. 595, 600 (1949) (Frankfurter, J. dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

(Conn. Supreme Court), excerpted in 44 U.S.L.W. 2426-27 (gainfully-employed daughter's income available for support of her indigent parent must be computed on same basis as gainfully-employed son's).[51]

In sum, the statutes before the Court in *Frontiero, Wiesenfeld* and the instant case were cut from the same pattern and convey the same message to the gainfully-employed woman: as a labor market participant she should not expect to be counted by her government as fully as her brother.[52] The plain fact is that the economic activity of Hannah Goldfarb netted less for the marital unit than the efforts of an identically situated gainfully-employed male. As the *Wiesenfeld* opinion indicates, it is hardly rational to condemn a compensation scheme under the *Frontiero* principle, but declare that same principle inoperative when the government distributes employment-related social insurance benefits.

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[51] For earlier indicators, see *Mengelkoch* v. *Industrial Welfare Comm'n*, 442 F.2d 1119 (9th Cir. 1971) (maximum hours laws applicable to women only present substantial federal constitutional question); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal.3d 1, 485 P.2d 529 (1971) (Federal and California Constitutions, as well as Title VII, bar exclusion of women from bartender occupation); *Paterson Tavern & Grill Owners Ass'n, Inc.* v. *Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Application of Shpritzer* v. *Lang*, 17 A.D.2d 285, 290, 234 N.Y.S.2d 285, 290 (1st Dep't 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of gender); *Wilson* v. *Hacker*, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

[52] See *Bowen* v. *Hackett, supra;* note 14 *supra;* Note, 89 Harv. L. Rev. 95 (1975).

B. Federal laws governing private and public sector employment require employers to accord spouses of female employees all fringe benefits accorded spouses of male employees; these laws reflect the overriding concern of Congress to eliminate gender-based discrimination in the economic sphere.

The discrimination ordered by 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) is irreconcilable with the firm national commitment to eradicate per se differentials based on an individual's sex in all spheres of employment. Gender as a means to determine employment-related benefits has been declared unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.;* the Equal Pay Act of 1963, as amended, 29 U.S.C. §206(d); Executive Order 11246, as amended by Executive Order 11375, 3 C.F.R. 169, 42 U.S.C. §2000e note; Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.;* and statutes governing federal employment, *e.g.*, 5 U.S.C. §7152.

Sex Discrimination Guidelines issued by the Equal Employment Opportunity Commission pursuant to Title VII, 29 C.F.R. §§1604.1-1604.10,[53] provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . 29 C.F.R. §1604.9(d).

The Guidelines, issued in 1972, are applicable to private as well as public employment; they explicitly proscribe

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[53] See also (OFCC) Sex Discrimination Guidelines for Government Contractors, implementing Executive Order 11375, 41 C.F.R. §60-20, particularly §60-20.3(c), (d).

differential treatment of men and women of the precise kind and quality here at issue. Moreover, they reflect consistent administrative and judicial interpretation prior to the time the Guidelines formally issued. For example, the Equal Employment Opportunity Commission explained in a 1969 widowers' pension benefit ruling, Title VII "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969) (emphasis in original). The Commission appraised as discriminatory and detrimental to gainfully-employed women a pension plan with an automatic benefit for widows but no benefit for widowers capable of self-support.[54] For court confirmation of the underlying principle, see *Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (Title VII violated by pension arrangement allowing women to retire earlier on full pension);[55] cf. *Griggs* v. *Duke Power*

[54] Accord, Decision No. 70-513, CCH Emp. Practices Guide ¶6114 (February 4, 1970) (payment of death benefits to surviving spouses of male but not female employees ruled unlawful); Decision No. 71-1100, CCH Emp. Practices Guide ¶6197 (December 31, 1970); Decision No. 70-660, CCH Emp. Practices Guide ¶6133 (March 24, 1970); Decision No. 70-510, CCH Emp. Practices Guide ¶6132 (February 4, 1970); Case No. CL 7-6-694, CCH Emp. Practices Guide ¶6009 (May 19, 1969) (all ruling unlawful employer and/or union health insurance plans providing for coverage of spouses of male but not female employees).

[55] Accord, *Chastang* v. *Flynn and Emrich Co.*, 365 F. Supp. 957 (D. Md. 1973) (permitting women to retire five years earlier than men and vesting pensions twice as rapidly for females was not designed to "compensate" women but to secure hold over men to keep them on the job); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *appeal on another point*, 519 F.2d 559 (2d Cir.), *cert. granted*, 44 U.S.L.W. 3358 (1975). For earlier EEOC rulings to the same effect, see Decision No. 72-1919, CCH Emp. Practices Guide ¶6370 (June 6, 1972); Decision No. 72-0702, CCH Emp. Practices Guide ¶6320 (December 27, 1971); Decision No. 71-562,

Co., 401 U.S. 424, 436 (1971); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1189 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

Similar rulings have been made by the Wage and Hour Division of the Department of Labor, which administers the Equal Pay Act. For example, the Division has ruled that the Act is violated by insurance plans pursuant to which the employer pays family coverage insurance premiums for married male employees but pays such premiums for married female employees only if they qualify as heads of their families. W & H Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (February 11, 1966).[56]

With respect to federal employment, Congress enacted a catch-all in December 1971, to assure that national policy governing the private sector applies with full vigor to the United States itself. 5 U.S.C. §7152 (P.L. 92-187, 85 Stat. 644) stipulates that all regulations granting benefits to government employees

CCH Emp. Practices Guide ¶6184 (December 4, 1970); Decision No. 70-75, CCH Emp. Practices Guide ¶6049 (August 13, 1969) (all ruling unlawful different optional retirement ages and benefits for men and women).

[56] See also W & H Opinion Letter No. 1275, CCH Emp. Practices Guide ¶5178 (January 15, 1973) ("principal wage earner" criterion has the inevitable effect of excluding most married women and therefore constitutes discrimination based on sex); W & H Opinion Letter No. 420, CCH Emp. Practices Guide ¶1208.591 (February 11, 1966) (insurance plan permitting male employee to insure spouse whether or not she is working but not permitting female employee to insure spouse found unlawful); W & H Opinion Letter No. 388, CCH Emp. Practices Guide ¶1208.59 (October 14, 1965) (employer-paid insurance plan providing family hospitalization coverage for male but not female employees found unlawful).

> shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children . . . .

Further, 5 U.S.C. §7152 declares that

> any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

The section applies not only to other provisions of Title 5, but also to "any other provision of law granting benefits to employees."[57]

Particularized changes were made for situations not encompassed within the 5 U.S.C. §7152 catch-all. Veterans' preferences formerly limited to wives and widows were extended in full to husbands and widowers. 5 U.S.C. §2108, as amended December 1971 by P.L. 92-187, 85 Stat. 644. Educational assistance allowances for veterans were equalized in the same manner. Formerly, Congress had defined the term "dependent," for purposes of an augmented veterans' educational assistance allowance (see 38 U.S.C. §1682), to include all wives, but to exclude husbands capable of self-support. Significantly, the amendment redefines "dependent" to include all husbands as well as all wives of eligible veterans. 38 U.S.C. §102(b), as amended October

[57] See also 5 U.S.C. §7151 (declaring it U.S. policy to insure equal employment opportunity without discrimination because of, *inter alia*, sex); 5 U.S.C. §7154 (prohibiting discrimination in federal employment because of, *inter alia*, sex); 5 U.S.C. §8902(f) (prohibiting exclusion from federal employee health benefit plans because of, *inter alia*, sex).

1972 by P.L. 92-540, 86 Stat. 1092. No support or need test is part of the scheme. Rather, the statute is premised on the interdependence of spouses.

Congress similarly adjusted the provision for cost of living allowances covering dependents of federal employees residing in foreign areas. Formerly, the allowance was allocated to "the employee's wife." The amendment extended the allowance to encompass "the employee's spouse." 5 U.S.C. §5924, as amended December 1971 by P.L. 92-187, 85 Stat. 644. Housing allowances for male and female members of the uniformed services and their spouses were equalized July 9, 1973 in accordance with this Court's May 14, 1973 *Frontiero* decision. 37 U.S.C. §401, as amended by P.L. 93-64, 87 Stat. 148.[58] Provisions of the Federal Employee's Compensation Act were amended in September 1974 to assure equality of secondary benefits for the spouses of men and women in the civilian service. 5 U.S.C. §§8101 (6) and 8101(11), as amended by P.L. 93-416, 88 Stat. 1143.

Of special note, even before enactment of the 5 U.S.C. §7152 catch-all, Congress altered the Civil Service Retirement Act to accord widowers the same automatic qualification as widows for survivors' annuities. 5 U.S.C. §8341. as amended January 1971 by P.L. 91-658, 84 Stat. 1961. A concise explanation for the change appears in H.R. Rep. No. 91-1469, 91st Cong., 2d Sess.:[59]

[58] The *Frontiero* equalization has been declared fully retroactive. 53 Comp. Gen. 148 (August 31, 1973).

[59] This change alone renders untenable appellant's ultimate argument that: 1) federal civil service retirement is "an alternative system" to social security; it would "distort the statutory scheme" to remove the widower's dependency test from social security. Brief for the Appellant at 8, 38. For an eminently clear policy was expressed by Congress when it removed the widower's

> [T]he present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees.

In all these measures, Congress rejected the independent man/dependent woman model once pervasive in federal and state legislation.[80] Instead, the principle informing the change is the economic and social interdependence of wife and husband, their partnership in a marital unit composed of two individuals of equal human status and dignity.

Appellant himself has placed in sharp focus the anachronistic quality of the congressional direction he is obliged to support in the case at bar. Carrying out a flatly contra-

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dependency test for secondary federal civil service retirement benefits. That policy should apply with equal force to social security. Again, it is instructive to view the matter in light of Hannah and Leon Goldfarb's situation. If Hannah had been the federal employee, insured under the federal civil service retirement system, Leon, as surviving spouse, would have qualified for monthly benefits until his death without regard to his dependency.

[80] For examples of similarly-motivated change in state laws, see 1975 Handbook on Women Workers 328 (formerly "women only" minimum wage laws extended to men); Freed & Foster, Taking Out the Fault but not the Sting, 12 Trial No. 4, 10 at 11 n.16 and 12 n.57 (April 1976) (in at least 32 states maintenance (alimony) "has been 'desexed' and, in accord with equal protection principles, has been made available to either party"); Note, 9 U. Mich. J. L. Ref. 138, 139, 161 n.161 (1975) (state workers' compensation legislation amended to extend conclusive presumption of dependency to widowers).

> dictory congressional command of more recent vintage, Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, appellant has declared that recipients of federal funds may not withhold from the spouse of a female wage earner *any* benefit provided to the spouse of a male wage earner. In Final Title IX Regulations Implementing Education Amendments of 1972 Prohibiting Sex Discrimination in Education, 45 C.F.R. §86.56-58, appellant has directed:
>
> §86.56
>
> • • • • •
>
> (b) *Prohibitions.* A recipient shall not:
>
> (1) discriminate on the basis of sex with regard to making fringe benefits . . . available to spouses . . . of employees differently upon the basis of the employee's sex;
>
> • • • • •
>
> (3) . . . participate in a pension or retirement plan which . . . discriminates in benefits on the basis of sex.
>
> §86.57
>
> (a) *General.* A recipient shall not apply any policy or take any employment action:
>
> • • • • •
>
> (2) which is based on whether an employee . . . is the head of household or principal wage earner in such employee's . . . family unit.
>
> • • • • •

§86.58

• • • • •

(b) *Benefits.* A recipient which provides any . . . benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same . . . benefit to members of the other sex.

These Title IX Regulations reflect legislative as well as executive consideration. Approved by the President in June 1975, the Regulations were placed before Congress for a forty-five day period during which hearings were held thereon, and became effective on July 21, 1975. For appellant's earlier declaration of the same position, see U.S. Department of Health, Education, and Welfare, Higher Education Guidelines pursuant to Executive Order 11246, October 1, 1972, at 13: "It is . . . unlawful for an employer to make benefits available to the wives and families of male employees where the same benefits are not available to the husbands and families of female employees."

The typical case to which appellant's Regulations and Guidelines are addressed illustrates the irony and illogic of his position in this litigation:

> W, a married woman, retires in 1973 and dies in 1974. E, her employer, conditions retirement and death benefits for her spouse (H) on proof that H received at least half his support from W, but grants the benefits in question automatically to the spouse of a male employee.

Appellant has declared that the differential just described, when invoked by E, causes and continues relegation of

women to an inferior position in the economy. But the very same differential, when invoked by appellant pursuant to 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D), is alleged to redress gender discrimination by ameliorating the inferior economic status of women. E might well wonder why he is not permitted to utilize a differential identical to the one appellant applies to the same couple. His bewilderment may be compounded should he determine to integrate his employees' pension scheme with social security. For it simply defies reason to claim that the classification perpetuates gender discrimination when it appears in an employer's pension scheme, but assuages or rectifies gender discrimination when it appears in the nation's "earned right," employment-related social insurance program. As expressed in recent commentary: "It would be highly anomalous for a court to decide that the sex classifications of OASDHI meet either the rational relationship or the compelling state interest test, when such classifications are not allowed in employment plans within the private sector." Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L.J. 181, 193, 195 (1973).

In comparison to the otherwise uniform federal approach to employment-related benefits, 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) stands out as a glaring anomaly, an isolated and anachronistic backwater. Indeed, there is but one rational explanation for appellant's defense of the §402 gender line in this Court at the very time appellant condemns use of that line by employers subject to his scrutiny: In both cases appellant is carrying out congressional orders. But the conflict in those orders and in their underlying premises is inescapable. One is wedded to an old

and misguided paternalistic notion; it "coincide[s] with the role-typing society has long imposed." *Stanton* v. *Stanton, supra,* 421 U.S. at 15. The other reflects appreciation that in an egalitarian union, man depends on woman fully as much as woman depends on man.

IV.

Consistent with the dominant congressional purpose, to provide old-age and survivors insurance in a manner that respects the dignity of the aged, the court should declare 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) unconstitutional insofar as these provisions deny to the spouse of a female wage earner benefits accorded the spouse of a male wage earner.

The court below, upon determining that the challenged differential discriminates impermissibly on the basis of gender, found the appropriate remedy—invalidation of the widower's support test—plainly marked by this Court's decisions. Accord, *Silbowitz, Jablon, Coffin, Abbott, supra,* pp. 15-16. In *Wiesenfeld,* this Court unanimously affirmed a judgment declaring[61]

> 42 U.S.C. Section 402(g) is unconstitutional insofar as it discriminates against widowers on the basis of sex.

Appellant, Secretary of Health, Education, and Welfare, was

> enjoined from denying benefits under Section 402(g) to widowers solely on the basis of sex

[61] See Jurisdictional Statement at 23a, *Weinberger* v. *Wiesenfeld.*

and

> directed to make payments to the plaintiff Stephen Wiesenfeld for such periods during which he would have been qualified to receive benefits but for the discrimination . . . based upon sex contained in Section 402(g).

Similarly, in *Frontiero, supra,* 411 U.S. at 691, the Court held:

> [T]he challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

The accompanying footnote (411 U.S. at 691 n. 25) reiterates:[62]

> Our conclusion in no wise invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse.

Both judgments reflect the Court's conclusion that extension of benefits to the spouse of a female wage earner under the same terms and conditions as those applicable to the spouse of a male wage earner would better serve the congressional purpose than would judicial destruction of the basic benefit scheme.

[62] See 53 Comp. Gen. 148 (August 31, 1973) (retroactive application of *Frontiero* to all similarly situated married members of the uniformed services); 40 F.R. 27744 (July 1, 1975) (announcing Veterans Administration policy to pay retroactively dependency allowances for the spouses of female veterans covering the period during which the Administration denied such allowances absent proof that the female veteran supplied over half her husband's support).

Precedent old and new points unambiguously in the remedial direction followed in *Wiesenfeld* and *Frontiero*. The appropriate inquiry was clearly stated by Mr. Justice Harlan in *Welsh* v. *United States*, 398 U.S. 333, 355-56 (1970) (concurring opinion): When a federal statute denies equal protection by establishing an unconstitutional classification, the judiciary must determine "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional." Accord as to state legislation *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 542-43 (1942); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931).[23]

In addition to *Wiesenfeld* and *Frontiero*, an array of recent decisions, involving state as well as federal laws, indicates this Court's preference for salvage, rather than demolition, of a constitutionally infirm legislative product. *E.g.*, *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974) (state health care); *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (federal food

[23] A succinct statement of the proper judicial perspective appears in *Schmoll* v. *Creecy*, 54 N.J. 194, 202, 254 A.2d 525, 529-30 (1969):

> [T]he judiciary cannot enlarge the reach of a statute, for that is solely a legislative function. The proposition is obvious enough, and it is equally true that a court may not restrict the scope of a statute. But neither proposition is involved when the question is whether a statute must fall because of a constitutional defect. Rather the question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation whether the Legislature would want the statute to succumb.

stamps); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) (state aid to families of the working poor); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (state public assistance); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (state and District of Columbia public assistance). In all of these cases, the extensions necessary to bring the statutes in line with constitutional limitations required substantial expenditures of public funds. In two of them, *United States Dep't of Agriculture* v. *Moreno* and *New Jersey Welfare Rights Organization* v. *Cahill*, the remedy was not tied to any "fundamental right" or "suspect criterion" determination. Similarly, in *Shapiro* v. *Thompson*, although the Court closely scrutinized the classification, it indicated that the same result would follow even under the traditional, more lenient "rational basis" standard of equal protection review. 394 U.S. at 638.

The remedial issue was treated explicitly in *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). *Moritz* involved a tax deduction available to never married women with incapacitated dependents, but not to similarly situated never married men. The Tenth Circuit concluded: (1) the gender line was inconsistent with the fifth amendment; (2) Congress would prefer extension of the deduction to men, thereby preserving the benefit for women, to invalidation of the provision. 469 F.2d at 470. Significantly, the remedial route in *Moritz* was noted by this Court when it pursued the same course in *Frontiero*, *supra*, 411 U.S. at 691 n.25.

Following this Court's guidance, lower courts have directed extensions kin to the one ordered by the court below in the instant case. See, *e.g.*, *Demiragh* v. *DeVos*, 476 F.2d

403, 405 (2d Cir. 1973) (welfare benefits); *de Castro* v. *Weinberger*, 403 F. Supp. 23 (N.D. Ill. 1975) (divorced wife's child-in-care social security benefit); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973) (augmented unemployment benefits for child in worker's care); *Bowen* v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) (unemployment and disability insurance benefits); *Chatman* v. *Barnes*, 357 F. Supp. 9 (N.D. Okla. 1973) (disability benefits); *Miller* v. *Laird*, 349 F. Supp. 1034 (D.D.C. 1972) (military medical benefits); *Page* v. *Welfare Comm'n*, Connecticut Law Journal, February 24, 1976, p. 3 (Conn. Supreme Court), excerpted in 44 U.S.L.W. 2426-27 (for purposes of determining amount adult child can contribute to indigent parent's support, married daughter must be granted all exemptions regulations provide for married sons); cf. *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (property exempt from tax when devised by wife to husband must also be exempt when devised by husband to wife).

Nor is the salvage approach a remedy of recent vintage. For decades, courts have recognized that, while the legislature ultimately may decide to revise or even abandon a statutory benefit, in the meantime, preservation rather than destruction of the legislation may be prescribed. See *Yale & Towne Mfg. Co.* v. *Travis*, 262 F. 576 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) (tax exemptions granted by statute only to state citizens extended to citizens of other states); *Burrow* v. *Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940), noted in 54 Harv. L. Rev. 1078 (1941) (plaintiff added to exempt class to cure unconstitutional exclusion); *Quong Ham Wah Co.* v. *Industrial Accident Comm'n*,

184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed*, 255 U.S. 445 (1921) (workers' compensation benefits extended to non-residents to cure constitutional infirmity); Note, 55 Harv. L. Rev. 1030, 1034-36 (1942).

It bears emphasis that the remedial issue in this case, as in *Wiesenfeld* and *Frontiero*, involves tentative adjudication, not definitive disposition by this Court. Ultimate authority and responsibility to eliminate or reshape the benefits in question remain with Congress. Consistent with the pattern unexceptionally followed by Congress in recent years, see pp. 51-60 *supra*, the benefits would not be retracted. Nor is it probable that Congress would saddle the Social Security Administration with the exorbitant administrative burden of applying a support test to all spouses. See *Jablon* v. *Secretary of Health, Education, and Welfare*, *supra*, 399 F. Supp. at 132 (reporting government counsel's representation that the administrative cost of an across-the-board dependency test could amount to as much as one billion dollars). Almost certainly, Congress would extend the same benefits to the spouses of male and female wage earners "without subjecting them to the humiliation" of a dependency test. See Remarks of Senator Walter F. George, Finance Committee Chairman, 96 Cong. Rec. 8491, 81st Cong., 2d Sess. (1950) (explaining that to avoid humiliating social security beneficiaries, the Finance Committee rejected a need or dependency qualification for old-age and survivors' payments to wives, widows and children).

Specific indicia of congressional preference abound. In recent years Congress has amended a host of federal employment-related benefit statutes to eliminate gender-based differentials. See pp. 53-56 *supra*. In no instance has Con-

gress effected equalization by cross-the-board application of a dependency test. In every instance it has extended to husbands or widowers the automatic qualification for secondary benefits once reserved for wives or widows.[64]

In the social security context, Congress has already embarked on repair necessary to eliminate gender-based differentials. Formerly, women received a more favorable retirement benefit calculation than men. In October 1972, Congress extended to male workers the more favorable computation formula once reserved for female workers. 42 U.S.C. §414(a)(1), as amended in October 1972 by P.L. 92-603, 86 Stat. 1329. Pertinent too is the broad separability clause contained in the Social Security Act. 42 U.S.C. §1303 provides:

> If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.

That section, of course, should divert the judiciary from any remedial course other than invalidation of 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D). See *Jablon* v. *Secretary of Health, Education, and Welfare, supra,* 399 F. Supp. at 131-32.

Finally, the U.S. Commission on Civil Rights, the Quadrennial Advisory Council on Social Security, and virtually

[64] Cf. the Equal Pay Act, 29 U.S.C. §206(d)(1), which encompasses employer expenditures for fringe benefits. The Act prohibits reducing the wage of any employee; it commands that in all cases, the required equalization must be up, never down. See *Brennan* v. *Corning Glass Works,* 417 U.S. 188 (1974) (full upward equalization is necessary to accomplish genuine neutrality).

every other official report and reasoned analysis in point recommends elimination of the dependency test for husband's and widower's benefits.[65]

Of particular interest in this respect is the Task Force report repeatedly cited by appellant to support the differential at issue here. See Brief for the Appellant at 20, 27, 35. In calling to this Court's attention snippets from that report, appellant omitted to disclose what the Task Force concluded:

> The Task Force recommends the following immediate and long-range proposals to strengthen Social Security protection for women . . . .
>
> Benefit rights for dependents of women workers should be equalized by:
>
> . . .
>
> Eliminating the dependency requirement for husband's or widower's benefits.

Women and Social Security, Working Paper prepared by the Task Force on Women and Social Security for use of the

[65] See note 13 *supra.* Most of the recommendations call for elimination of the support test for husband's and widower's benefits, without further statutory alteration. *E.g.,* U.S. Commission on Civil Rights, Toward Elimination of Sex-Based Differentials in the Social Security System 10 (December 1974); S. 2860, 94th Cong., 2d Sess., 122 Cong. Rec. S5014 (daily ed. April 6, 1976) (Sen. Church, Chairman, Senate Committee on Aging); S. 1729, 94th Cong., 1st Sess., 121 Cong. Rec. S7949 (daily ed. May 13, 1975) (Sen. Bayh); H.R. 11555, 94th Cong., 2d Sess. (January 28, 1976) (Rep. Conlan). The Quadrennial Council proposal would couple elimination of the support test with a further revision so that a pension based on work in noncovered employment would affect entitlement to, and the amount of, secondary benefits. Cf. Note, 9 U. Mich. J. L. Ref. 138, 161 n.161 (1973) (1972-75 state legislative revisions equalizing workers' compensation survivors' benefits by presuming dependency of widowers as well as widows).

Special Committee on Aging, United States Senate, Committee Print, 94th Cong., 1st Sess. 39 (1975). See also *id.* at 16 ("[T]he wife's contributions purchase less in terms of dependents benefits. . . . Such explicit sex discrimination clearly calls for correction. The cost of removing these dependency requirements is low . . . ."), 17 (close scrutiny should be given to questions of equity and the treatment of married women's labor-force participation), 19-20 ("there is no sound reason for treating husbands and widowers differently than wives and widows"), 42 (if the §402 gender-based differentials are removed, "the working wife's contributions will have the same value as do her husband's in purchasing family protection").

In sum, the express remedial preference of Congress in all of its recent measures eliminating gender-based differentials, well-established judicial precedent and reasoned commentary[66] signal the direction for a court concerned with interim preservation rather than destruction of legislative policy. Elimination of benefits to a wage earner's spouse would conflict with a primary statutory objective. A cross-the-board dependency test would be inconsistent with the basic design of social security as an "earned right," not a public assistance program. Further, extension of the support requirement would impose an administrative burden of potentially monstrous proportion. Moreover, Leon Goldfarb commenced this action to secure benefits under his insured wife's account. Neither application of a dependency test cross-the-board nor elimination of survivors' benefits forms any part of his complaint. Cf. *Colburn* v. *Colburn*, 20 Md. App. 346, 353-54, 316 A.2d 283, 287-88

[66] See Notes, 89 Harv. L. Rev. 95 (1975); 49 Ind. L.J. 181 (1973).

(Md. Ct. App. 1974). Judicial resort to those "remedies" would not respond to the "case or controversy" Leon Goldfarb's complaint presents.[67] Under the circumstances, declaration of the invalidity of the §§402(c)(1)(C) and (f)(1)(D) one-half support stipulation is the only suitable judicial remedy.[68] 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) should be invalidated insofar as those provisions require proof that the female insured individual supplied at least one-half of her spouse's support. See *Frontiero*, 411 U.S. at 691 n.25.

[67] Since similarly circumstanced spouses of male wage earners have been accorded the benefit, the denial of equal protection to appellee can be repaired only by according him the benefit from the date of his application.

[68] The Court's tentative adjudication striking the support stipulation would bar only one final solution. Congress could not draw a gender line. But it could consider a full range of functional approaches, including measures that would yield a decrease, rather than any increase in benefit costs. See, *e.g.*, Quadrennial Council proposal, cited *supra*, notes 13 and 65; Women and Social Security, Working Paper, *supra*, at 77-79 (supplementary statement by Alvin M. David, Former Assistant Social Security Commissioner in charge of program evaluation and legislative planning).

CONCLUSION

For the reasons stated above, the decision of the district court declaring 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) unconstitutional insofar as these provisions discriminate on the basis of gender should be affirmed.

Respectfully submitted,

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ADDENDUM

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42 U.S.C. §402, in pertinent part, provides:

Wife's insurance benefits

(b)(1) The wife . . . and every divorced wife . . . of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—

(A) has filed application for wife's insurance benefits,

(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual,*

(C) in the case of a divorced wife, is not married, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual,

shall . . . be entitled to a wife's insurance benefit . . . .

Husband's insurance benefit

(c)(1) The husband . . . of an individual entitled to old-age or disability insurance benefits, if such husband—

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* The child-in-care reference has no counterpart in §402(c)(1) (husband's insurance benefits). But see *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) *was receiving at least one-half of his support* . . . from such individual [at the time she became entitled to old-age benefits]

. . .

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and,

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit . . . . (Emphasis supplied.)

Widow's insurance benefits

(e)(1) The widow . . . and every surviving divorced wife . . . of an individual who died a fully insured individual, if such widow or such surviving divorced wife—

(A) is not married,

(B) (i) has attained age 60 . . .

(C) (i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died . . . or

(ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained age 65,* and

(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,

shall be entitled to a widow's insurance benefit . . . .

Widower's insurance benefits

(f)(1) The widower . . . of an individual who died a fully insured individual, if such widower—

(A) has not remarried,

(B) (i) has attained age 60 . . .

(C) has filed application for widower's benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died . . .

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* The "mother's insurance benefits" reference has no "father's insurance benefits" counterpart in §402(f)(1) (widower's insurance benefits). But see *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

(D) (i) *was receiving at least one-half of his support* . . . from such individual at the time of her death . . .

(E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit . . . . (Emphasis supplied.)

MOTION FILED
NOV 15 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,

Appellant,

—v.—

LEON GOLDFARB,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION OF APPELLEE FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION OF APPELLEE FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Appellee Leon Goldfarb respectfully moves, pursuant to Rule 41(5),(6) of this Court's Rules, for leave to file the within supplemental brief. Special leave is sought in order to present to the Court a recent decision of the Court of Appeals for the Sixth Circuit bearing directly on the

instant appeal: Kalina v. Railroad Retirement Board, No. 75-2256, decided and filed September 13, 1976. The Kalina decision declares unconstitutional a gender line in the Railroad Retirement Act counterpart to and modeled on the Social Security Act gender-based classification at issue in Mathews v. Goldfarb.

The Sixth Circuit Kalina decision was rendered subsequent to the filing of appellee Goldfarb's brief in chief. A summary of the Kalina decision was published in the October 19, 1976 issue of United States Law Week at pp. 2200-2201. Law Week publication occurred two weeks after the October 5, 1976 argument in Mathews v. Goldfarb. Until the appearance of the Law Week summary, appellee Goldfarb and his attorneys had no knowledge or information as to the pendency of or decision in the Kalina case.

Respectfully submitted.

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IN THE

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October Term, 1975

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR APPELLEE

Appellee Goldfarb files this supplemental brief to present to the Court the September 13, 1976 opinion of the Court of Appeals for the Sixth Circuit in Kalina v. Railroad Retirement Board, No. 75-2256, summarized in 45 U.S.L.W. 2200-2201

(October 19, 1976).* The Kalina decision declares unconstitutional a gender-based differential in section 2(f) of the Railroad Retirement Act, codified in 45 U.S.C. §228b(f)(i),(ii). This provision of the Railroad Retirement Act is modeled on the Social Security Act section 202 gender-based classification, codified in 42 U.S.C. §§402(b),(c)(1)(C),(e),(f)(1)(D), sub judice in Mathews v. Goldfarb. Argument in Goldfarb occurred on October 5, 1976; appellee Goldfarb and his attorneys had no information as to the pendency of or judgment in Kalina prior to publication of the opinion summary in the October 19, 1976 issue of United States Law Week.

For purposes of entitlement to a spouse's annuity, the Railroad Retirement Act defines the term spouse as "the wife" or "a husband [who] was receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began." In Kalina v. Railroad Retirement Board, supra, the Sixth Circuit determined that the support test applicable to a railroad worker's husband, but not to a railroad worker's wife, mandates "different treatment of similarly situated male and female railroad employees (and derivatively, their spouses)." Slip Opinion

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* The Slip Opinion in Kalina is reproduced in an Appendix to this brief. Appendix pages 1a-13a correspond to pages 1-13 of the Slip Opinion.

12. Finding the discrimination "without a legally sufficient basis,"[1] the Sixth Circuit concluded the support test "violates the equal protection component of the due process clause." Slip Opinion 2.

Judge McCree, writing for a unanimous bench, stated "Frontiero v. Richardson, 411 U.S. 677 (1973) and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) control this case." Slip Opinion 3-4, 12.[2] The

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1 The justifications tendered by the Railroad Retirement Board in Kalina (wives need the benefit, husbands do not) were virtually identical to those tendered by the Solicitor General in the instant case. See Kalina Slip Opinion 9. And compare Frontiero v. Laird, 341 F. Supp. 201, at 207, 208, 209 (M.D. Ala. 1972) (four times characterizing plaintiffs' claim as one for a "windfall"), with id., 341 F. Supp. at 211 (dissenting opinion) ("windfall" label adds nothing to the analysis and begs the question), reversed sub nom. Frontiero v. Richardson, 411 U.S. 677 (1973).

2 As to husband's benefits under the Social Security Act, the same conclusion was reached by a sixth district court after appellee Goldfarb's brief in chief was filed: Hau v. Secretary of Health, Education, and Welfare, D.N.J. Civil Action No. 74-1016, July 29, 1976 (three-judge court) (Frontiero and Wiesenfeld "lead inescapably to the conclusion that the dependency requirement of 42 U.S.C. §402(c)(1)(C) is invidiously discriminatory on the basis of sex, and is, therefore, unconstitutional").

opinion points out:

> It is clear that the primary legislative purpose in enacting the spouse's annuity provision was to increase benefits to retired workers and their families.

Slip Opinion 9 (emphasis in original).[3] As to the model Congress used when it enacted the Railroad Retirement Act spouse's annuity, Judge McCree observed:

> [T]he challenged term "spouse," which conclusively presumed that the wife of a male employee was dependent, but required the husband of a female employee to prove dependency in fact, was simply borrowed from the Social Security Act.

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[3] Compare the Solicitor General's representation to this Court, in a case scheduled for argument some weeks after Goldfarb: "Congress was aware that making [social security secondary] benefits available to family members would conduce to the wage-earner's own economic well-being during his lifetime"; "[p]ayment to [a wife] of secondary benefits . . . assists the wage-earner as well." Brief for the Appellant at 14, 22, Mathews v. deCastro, No. 75-1197 (emphasis supplied).

Slip Opinion 9. Further, the Sixth Circuit determined:

> It is not unreasonable to conclude that when Congress adopted the Social Security Act definition that resulted in the discriminatory treatment of female employees it embraced the "archaic and overbroad generalization" that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support" . . . .

Slip Opinion 9-10.[4]

The Kalina opinion also addresses the Railroad Retirement Board's argument that no remedy should be sanctioned "that would impose additional costs on the overburdened retirement fund." Slip Opinion 12. Referring to the considered decision of Congress "that spouses of male railroad workers are to be conclusively presumed dependent,"

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[4] Cf. Lewis v. Cohen, 417 F. Supp. 1047 (E.D. Pa. 1976) (reported in October 25, 1976 Advance Sheet, issued approximately three weeks after Goldfarb argument) (contrasting "overbroad generalization" of the kind involved in Kalina and the instant case, with gender-based classification that does not denigrate the efforts or status of gainfully-employed women, but instead genuinely aims at and achieves alleviation of discrimination against them).

the Sixth Circuit ruled:

> [C]ourts cannot disregard the directions of Congress so long as they are constitutional. It would be incongruous if in adopting a remedy for a constitutional violation by the legislature we were to engage in improper judicial conduct. The Board should address its concern for the solvency of the retirement fund to Congress, which, if persuaded, may in its judgment require all spouses to prove dependency in fact, or even eliminate the spouse's annuity entirely.

Slip Opinion 12-13.[5]

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[5] The Sixth Circuit noted a lone, contrary view on the proper remedy. Slip Opinion 12 n.4, citing Moss v. Secretary of H.E.W., 408 F. Supp. 403 (M.D. Fla. 1976). No final disposition has been made by the district court in Moss. That court, in response to plaintiffs' timely motion to alter judgment, directed a stay pending this Court's decision in Goldfarb. Order Staying Proceedings "until the United States Supreme Court has rendered a decision in the case of Goldfarb v. Secretary of Health, Education, and Welfare," entered March 19, 1976 in Moss v. Secretary of Health, Education, and Welfare, No. 74-721-CIV-T-H (M.D. Fla. Tampa Division, Wm. Terrell Hodges, District Judge).

CONCLUSION

Since Kalina and Goldfarb involve the identical constitutional question and warrant the same resolution, appellee Goldfarb respectfully requests that the Court take account of Kalina in resolving the appeal in Goldfarb.

Respectfully submitted.

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APPENDIX

No. 75-2256

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTHONY S. KALINA, *Petitioner,* v. RAILROAD RETIREMENT BOARD, *Respondent.*	ON PETITION to Review Decision of the Railroad Retirement Board.

Decided and Filed September 13, 1976.

Before: PECK and McCREE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

McCREE, Circuit Judge. This is a petition to review the Railroad Retirement Board's decision that Anthony Kalina is not entitled to a spouse's annuity under the Railroad Retirement Act of 1937, 45 U.S.C. §§ 228a – 228z-1 because he did not establish that he was receiving at least one-half of his support from his wife on the date that her annuity as a retired railroad worker began. Petitioner challenged the constitutionality of section 2(f) of the Act, 45 U.S.C. § 228 b (f)(ii), which defines the term "spouse,"[1] but the Board refused to

[1] The Railroad Retirement Act of 1937, 45 U.S.C. §§ 228a-228z-1, was completely revised by Pub. L. 93-445, October 16, 1974, 88 Stat. 1305, effective January 1, 1975. The revised and amended act was redesignated the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231t. The challenged definition of a "spouse" for the purpose of a spouse's annuity was re-enacted in virtually identical language at 45 U.S.C. § 231a(c)(3)(ii):

consider his contention, stating that "[q]uestions of constitutionality are for the courts and not the administrative agencies to rule upon." Our jurisdiction is based upon 45 U.S.C. §§ 228k and 355(f).

We hold that § 228b(f)(ii) violates the equal protection component of the due process clause because it provides dissimilar treatment for men and women who are similarly situated, without a legally sufficient basis for the discrimination. Accordingly, petitioner Kalina is entitled to a spouse's annuity.

Petitioner's wife, Emilie Kalina, is a retired railroad employee who receives a retirement annuity pursuant to section 2(a)(1) of the Act, 45 U.S.C. § 228(a)(1). According to her uncontroverted testimony before the Board, Mrs. Kalina began working in the railroad industry about 1920. She married petitioner in 1969, and began receiving her annuity in 1971, shortly after the last day on which she worked in the railroad industry. She was then about 70 years of age. In her application for her annuity, Mrs. Kalina listed her position as chief clerk. In answer to the question whether her husband was dependent upon her for more than one-half of his support, she answered "no."

In 1972, petitioner filed an application for a spouse's annuity. When the Bureau of Retirement Claims determined that petitioner was not entitled to an annuity, he appealed to the Railroad Board. The evidence before the Board indicated that for many years before his marriage, petitioner lived with Mrs. Kalina, who was a distant cousin, and that Mrs. Kalina maintained the home and paid its expenses without any financial help from petitioner. Petitioner, who first came to this country in 1948, is a teacher. His employment has been irregular. The Board found that in the 12 months before Mrs. Kalina began receiving her annuity, her income was approxiately $7,600; while during the same period, petitioner, who had found employment as a college teacher in another state, earned about $8,400. The Board determined that petitioner had not established that he was receiving over one-half of his support from Mrs. Kalina at the time her annuity began. Accordingly it concluded that he was not entitled to a spouse's annuity.

[For purposes of this subchapter the term "spouse" shall mean the wife or husband of an annuitant . . . who . . .]
. . .(ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's annuity under subsection (a)(1) of this section began.

The only change from the earlier version was the addition of a cross reference to the wife's annuity provision. The original version stated:

(ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began.

Section 2(f) of the Railroad Retirement Act provides that the term spouse for the purposes of spouse's annuity shall mean:

> (i) . . . the wife or husband of a retired annuitant . . .; and
>
> (ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began.

For the purpose of this appeal, petitioner does not contest the Board's determination that he was unable to prove that he received over one-half of his support from his wife at the time her annuity began. The issue before us is whether the equal protection component of the Fifth Amendment due process clause is violated by a provision requiring the spouse of a retired *female* railroad employee, but not the spouse of a retired *male* employee, to prove actual dependency in order to qualify for a spouse's annuity.

The parties have devoted much of their argument to the question whether sex is a suspect classification that requires strict scrutiny of the asserted justification for disparate treatment to avoid offending the equal protection and due process clauses. However, we find it unnecessary to reach this issue, because the Supreme Court's recent decision in *Frontiero* v.

Richardson, 411 U.S. 677 (1973) and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) control this case.

In *Frontiero*, the Court considered 37 U.S.C. §§ 401, 403 and 10 U.S.C. §§ 1072 and 1076, which required a female member of the uniformed services who sought housing and medical benefits for her spouse to prove dependency in fact (i.e. that she contributed over one-half of her husband's support), although male members of the services were not required to prove that their wives were dependent in fact in order to obtain the same benefits. The Court held that this requirement violated the due process clause of the Fifth Amendment. Four members of the Court held that sex is an inherently suspect classification, like race, alienage, and national origin. Accordingly, they subjected the challenged discrimination to "close judicial scrutiny." The sole basis for the different treatment was the sex of the persons involved. The statute denied benefits to a female member who provided less than one-half of her spouse's support, although it granted benefits to a male member in the same circumstance. The government contended that this different treatment for men and women similarly situated was justified by "administrative convenience." However, as the plurality opinion observed, no evidence was submitted showing that this procedure was less costly than one requiring all service members to prove the dependency of their spouses. The plurality opinion held that the challenged statutes, by according different treatment to males and females similarly situated for the sole purpose of administrative convenience, violated due process. citing *Reed* v. *Reed*, 404 U.S. 71 (1971).

Justice Stewart concurred in the judgment, stating only that he agreed "that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U.S. 71." 411 U.S. 691.

Justice Powell, with whom the Chief Justice and Justice Blackmun concurred, found it unnecessary to determine whether sex was a suspect classification. They stated that in

their view *Reed* v. *Reed* abundantly supported the Court's decision.[2]

More recently, in *Schlesinger* v. *Ballard*, 419 U.S. 498, 507 (1975), the Court restated *Frontiero*:

> In both *Reed* and *Frontiero* the challenged classifications base on sex were premised on overboard generalizations that could not be tolerated under the Constitution. . . . In *Frontiero*, the assumption underlying the Federal Armed Services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

Later in the same year, the Supreme Court invalidated 42 U.S.C. § 402(g), which provided that Social Security survivors' benefits based on the earnings of a deceased *husband* and father were payable *both* to the couple's minor children and to the widow, although benefits based upon the earnings of a deceased *wife* and mother were payable only to the couple's minor children, and *not* to the widower. In *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975)[3] the Court held that the

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[2] Justice Rehnquist dissented "for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero* v. *Laird*, 341 F. Supp. 201 (1972)." 411 U.S. 691.

[3] Justice Douglas took no part in the case.

Justice Powell wrote a separate concurring opinion, in which Chief Justice Burger joined, to "identify the impermissible discrimination effected by § 402(g) somewhat more narrowly than the Court does." 420 U.S. 654. Justice Powell emphasized that the statute "impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical." He concluded that "no legitimate governmental interest supports this gender classification." 420 U.S. 654-655. He emphasized the fact that Social Security is designed for the protection of the "family," and although it lacks a contractual basis, it is a contributory system. Likewise the railroad retirement program is a contributory system which is designed to protect the worker and his family, and no legitimate governmental interest supports the practice of providing Mrs. Kalina's family less protection than is provided for the family of a male employee.

Justice Rehnquist concurred separately in order to emphasize that analysis of the legislative history and statutory context of § 402(g)

gender-based distinction made by § 402(g) is indistinguishable from that invalidated in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). *Frontiero* involved statutes which provided the wife of a male serviceman with dependents' benefits but not the husband of a servicewoman unless she proved that she supplied more than one-half of her husband's support. The Court held that the statutory scheme violated the right to equal protection secured by the Fifth Amendment. *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), explained: "In . . . *Frontiero* the challenged [classification] based on sex [was] premised on overbroad generalizations that could not be tolerated under the Constitution. . . . [T]he assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not." *Id.*, at 507. A virtually identical "archaic and overbroad" generalization, *id.*, at 508, "not . . . tolerated under the Constitution" underlies the distinction drawn by § 402(g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support.[11] [Footnote omitted.] 420 U.S. 642-643.

The Court observed that although the assumption that men are more likely than women to be the primary supporters of their families "is not entirely without empirical support," nevertheless,

> such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support. 420 U.S. 645.

"establishes that the Government's proffered legislative purpose is so totally at odds with the context and history of § 402(g) that it cannot serve as a basis for judging whether the distinction between men and women serves a valid legislative objective." 420 U.S. 655. Accordingly, Justice Rehnquist found it unnecessary to reach the issue whether the statute "violates the Fifth Amendment as applied in *Frontiero* v. *Richardson* . . . ." 420 U.S. 655.

The Court rejected the argument that the noncontractual nature of Social Security benefits permitted Congress to provide a covered female employee with fewer benefits than it provided for a covered male. It also rejected the contention that the classification under attack was one "reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families." 420 U.S. 648. The Court held that "the mere recitation of a benign, compensatory purpose is not an automatic shield that protects against any inquiry into the actual purposes underlying a statutory scheme." 420 U.S. 648. The Court reasoned that "[g]iven the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of 402(g) is entirely irrational." 420 U.S. 651.

The Court concluded:

> Since the gender-based classification of § 402(g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*. Like the statutes there, "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause." *Reed* v. *Reed*, 404 U.S. 71, 77 (1971). 420 U.S. 653.

The same reasoning applies here. The legislative history of the provision of the Railroad Retirement Act challenged here suggests no reason for the discriminatory treatment of male and female employees with respect to the spouse's annuity. The House Committee omitted a spouse's annuity that had been proposed in an earlier draft of H.R. 3669 because the provision was considered too controversial. The Committee Report stated that the spouse's annuity was "opposed as being unfair to unmarried men." 1951 Code Cong. & Admin. News 2536-2537. It is also observed that the actuarial evidence regarding the effect on the fund was conflicting. 1951 Code

Cong. & Admin. News 2537. The Senate version of the bill, however, included a spouse's annuity provision, and the Conference Committee Report merely states,

> The Senate Amendment to the text of the bill provided for an annuity for the widower of a deceased railroad employee, where such widower had attained 65 years of age and had been receiving at least one-half of his support from his wife employee at the time of her retirement or death. The bill as passed [sic] the House contained no such provision. The conference substitute follows the language of the Senate amendment in this respect. 1951 Code Cong. & Admin. News 2557.

The legislative history also discloses that the annuity was added as part of an extensive revision of the Railroad Retirement Act intended to increase benefits to meet the "desperate" and "urgent" needs of "retired workers *and their families.*" 1951 Code Cong. & Admin. News 2529. [Emphasis added.] Congress sought to increase the benefits to a level at least equal to that of Social Security benefits, because railroad employees contributed at a higher rate than the employees covered by Social Security. The Railroad Retirement Board, which supported H.R. 3669, provided an analysis of the challenged provision:

> The new subsection (g) defines "spouse" . . . . If the spouse is the husband of the employee he must have been receiving at least one-half of his support from his wife at the time her annuity or pension began.
>
> *The term "spouse" is defined in the same terms as husband and wife, respectively, under the Social Security Act,* except that under the Railroad Retirement Act the husband is not required to file proof of support within any specific period of time. Hearings on H.R. 3669 before the Committee on Interstate and Foreign Commerce, 82nd Cong., 1st Sess., 66 (1951). [Emphasis added.]

The Board argues that the purpose of the spouse's annuity was to provide increased benefits "in cases of greatest need, that is to say where two people must live on the benefits provided under the Railroad Retirement Act." H.R. Rep. No. 976, 82nd Cong., 1st session, on H.R. 3669, 49 (1951). The Board concludes that "[a]lthough the legislative history of section 2(f)(ii) does not expressly state that one of the goals to be achieved by its enactment would be to partially redress economic discrimination practiced against women, that purpose is implicit in the stated legislative purpose of providing added security for married couples." The Board contends that Congress concluded that the wife of a male railroad employee was less likely to have been engaged in employment that would yield a substantial income and adequate retirement benefits than was the husband of a female employee. The Board cites a large body of statistics to demonstrate that in 1950, women in the American work force were paid substantially lower wages than men, and that this disparity has continued until the present.

Although women have been and continue to be at a disadvantage in the labor market, as the Supreme Court observed in *Weinberger*, "the mere recitation of a benign compensatory purpose" is no justification for a statutory scheme that imposes yet another and different sex-based discrimination. It is clear that the primary legislative purpose is enacting the spouse's annuity provision was to increase benefits to retired workers *and their families.* As often happens in legislative drafting, the challenged term "spouse," which conclusively presumed that the wife of a male employee was dependent, but required the husband of a female employee to prove dependency in fact, was simply borrowed from the Social Security Act. It is not unreasonable to conclude that when Congress adopted the Social Security Act definition that resulted in the discriminatory treatment of female employees it embraced the "archaic and overbroad generalization" that "male workers' earnings are vital to the support of their families, while the earnings of

female wage earners do not significantly contribute to their families' support" that the Supreme Court rejected in *Weinberger* v. *Weisenfeld*, 420 U.S. 643. *Frontiero* and *Weinberger* make it clear that this generalization may not be relied upon to "denigrate the efforts" of women, like Mrs. Kalina, who work and whose earnings contribute significantly to the support of their families. Moreover, since the purpose of the spouse's annuity was to provide a desperately and urgently needed increase in the benefits paid to railroad workers and their families, the gender-based distinction challenged here, like those in *Frontiero* and *Weinberger*, is "entirely irrational."

Moreover, each of the four courts that have considered challenges to the analogous section of the Social Security Act, 42 U.S.C. § 402(c)(1)(C), have also concluded that the discrimination in that section violated the equal protection component of the Due Process clause. *Silbowitz* v. *Secretary of H.E.W.*, 397 F. Supp. 862 (S.D. Fla. 1975), U.S. App. pending, 44 U.S.L.W. 3352; *Coffin* v. *Secretary of H.E.W.*, 400 F. Supp. 953 (D.D.C. 1975), U.S. App. pending, 44 U.S.L.W. 3375, 3386; *Jablon* v. *Secretary of H.E.W.*, 399 F. Supp. 118 (D. Md. 1975), U.S. App. pending, 44 U.S.L.W. 3364; *Moss* v. *Secretary of H.E.W.*, 408 F. Supp. 403 (M.D. Fla. 1976). Section 402(c)(1)(C) provides that a husband of an individual entitled to old age or disability insurance is entitled to "a husband's insurance benefit" if he has filed an application, has attained the age of 62 and "was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, for such individual. . . ." In *Silbowitz*, for example, Chief Judge Fulton analyzed *Frontiero* and *Weisenfeld*, and concluded:

> Section 402(c)(1)(C) is the product of an identical stereotype: all women are dependent upon their husbands for their support. Thus, under § 402(b) all otherwise qualified wives of wage earners will receive benefits, irrespective of their dependency. Husbands are disqualified unless they are dependent. The discrimination is not

> related to family needs. Women who had no need of their husband's income receive benefits and enlarge the fund available to support husband and wife in their old age. Similarly situated husbands are denied benefits and the amounts available to meet the needs of those husbands and wives are less. Identically situated people are accorded different treatment solely on the basis of their sex.
>
> Like the statutes in *Frontiero* and *Wiesenfeld*, § 402(c)(1)(C), "'[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause' *Reed* v. *Reed*, 404 U.S. 71, 77, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971)." *Weinberger* v. *Wiesenfeld*, 420 U.S. 653, 95 S.Ct. at 1236. 397 F. Supp. 866.

Judge Fulton also rejected the government's contention that the statutory scheme was rationally connected with the Act's intention to provide benefits to those persons with the greatest needs:

> It is obvious that the statutes (§§ 402(b) and 402(c)(1)(C)) do not accomplish that purpose. Wealthy wives become entitled to benefits regardless of their dependency. Economically independent wives receive benefits without regard to their need. Indeed, if the public fisc is the concern, then a rational statute would require both male and female spouses to show dependency. The defendant's reliance upon *Geduldig*, is misplaced. While that case recognized the allocation of resources as a legitimate state interest, it did so in the context of a claim that women should be entitled to California state disability insurance benefits for pregnancy. In this case Mrs. Silbowitz is not seeking a benefit which, by its nature, is limited to women. Unlike the plaintiff in *Geduldig* she, as a covered worker, has paid for a benefit which a male would receive. The conservation of fiscal resources cannot be accomplished "by drawing invidious classifications." *Miller* v. *Laird*, 349 F.Supp. 1034, 1046

(3 judge ct. D.D.C. 1972); *Diaz* v. *Weinberger*, 361 F. Supp. 1, 11 (3 judge ct. S.D.Fla. 1973) (Set for reargument in the Supreme Court, 420 U.S. 959, 95 S.Ct. 1346, 43 L.Ed.2d 436).

Accordingly, he held that the grant of benefits to wives, but not to husbands, without a showing of dependency, served only administrative convenience, and that this purpose was insufficient to avoid a violation of due process.

Remedy

Since we hold that the different treatment of similarly situated male and female railroad employees (and derivatively, their spouses) violates due process, the only remaining question is the proper remedy. The Board suggests that we should not adopt a remedy that would impose additional costs on the overburdened retirement fund, a result that it predicts will follow a holding that Mr. Kalina (and, by implication, the husbands of other railroad workers) is entitled to a spouse's annuity without regard to proof of dependency. Instead, the Board suggests that we should hold that all spouses, female as well as male, of railroad employees must prove that they are dependent in fact in order to qualify for a spouse's annuity. This result would be contrary to the considered decision of Congress that spouses of male railroad workers are to be conclusively presumed dependent. And courts cannot disregard the direotions of Congress so long as they are constitutional.[4] It would be incongruous if in adopting a remedy for a constitutional violation by the legislature we were to engage in improper judicial conduct.[5] The Board should address its con-

[4] *But see Moss* v. *Secretary of H.E.W.*, 408 F. Supp. 403 (M.D. Fla. 1976).

[5] Accordingly, we do not reach the subsidiary questions raised by the Board's argument, such as whether it would be necessary for all those wives of railroad employees who have already received spouse's annuities to prove that they were dependent in fact when their husbands' annuities began, and, if they are unable to do so, whether they should be required to repay the annuities received.

cern for the solvency of the retirement fund to Congress, which, if persuaded, may in its judgment require all spouses to prove dependency in fact, or even eliminate the spouse's annuity entirely.

The decision of the Railroad Retirement Board is reversed and the case is remanded for a determination of the amount of annuity benefits due to petitioner without regard to section 2(f)(ii) of the Act. Petitioner shall receive the costs of this review.